Petition

No. 81-534

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN O'DELL, GARY GRAHAM, DAVID NEIL, ARTHUR DILL, Chief of Police of the City of Denver, and the CITY AND COUNTY OF DENVER,

Petitioners,

vs.

ANDREW ESPINOZA, individually and as Personal Representative of the Estate of Arthur Espinoza, deceased, and as guardian of JEANNE ESPINOZA, JR., BARRY ESPINOZA, and BEVERLY ESPINOZA, heirs-at-law of the deceased, and the ESTATE OF ARTHUR ESPINOZA, deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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Questions Presented for Review

A. Whether a child may assert a claim pursuant to 42 U.S.C. § 1983 premised on a federal right personal to the child which is grounded on a constitutional liberty interest in the continuation of such child's family relationship with his parents?

B. Assuming *arguendo* that such a § 1983 claim exists, does 42 U.S.C. § 1988 require the consideration of the state wrongful death remedy in determining the damages recoverable pursuant to the child's § 1983 claim where such claim is based on the wrongful taking of the life of the child's parent?

C. Assuming *arguendo* that such a § 1983 claim exists and that § 1988 requires consideration of the state wrongful death remedy, is the wrongful death remedy inapplicable simply because it limits the child's recovery to net pecuniary loss?

D. Whether the existence of a state wrongful death remedy precludes a § 1983 claim premised on the wrongful taking of a life?

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Opinion Below

The opinion of the Colorado Supreme Court and its order modifying such opinion is set forth in the Appendix.

Grounds on Which the Jurisdiction of this Court is Invoked

The Colorado Supreme Court entered its judgment on May 4, 1981. On May 27, 1981, the Colorado Supreme Court entered an Order extending the time to June 1, 1981, within which to file a Petition for Rehearing. On June 8, 1981, the Colorado Supreme Court entered an order modifying its opinion, and as modified, denied the Petition for Rehearing. 28 U.S.C. § 1257 (3) is the statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari.

Constitutional Provision and Statutes

U.S. Constitution Amendment XIV, which provides:

> "SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

42 U.S.C. § 1983:

> "Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. § 1988:

> Proceedings in vindication of civil rights. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, Title XI of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of a provision of the United States Internal Revenue Code, or title VI of the Civil Right Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

C.R.S. 1973 § 13-21-201:

> Damages for death. (1) When any person dies from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant or employee while running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any coach or other conveyance operated for the purpose of carrying either freight or passengers for hire while in charge of the same as a driver, and when any passenger dies from an injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or other conveyance operated for the purpose of carrying either freight or passengers for hire, the corporation or individuals in whose employ any such officer, agent, servant, employee, master, pilot, engineer, or driver is at the time such injury is committed, or who owns

any such railroad, locomotive, car, or other conveyance operated for the purpose of carrying either freight or passengers for hire at the time any such injury is received, and resulting from or occasioned by the defect or insufficiency above described shall forfeit and pay for every person and passenger so injured the sum not exceeding ten thousand dollars and not less than three thousand dollars, which may be sued for and recovered:

a) By the husband or wife of deceased; or

b) If there is no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of the deceased, or

c) If the deceased is a minor or unmarried, then by the father or mother who may join in the suit, and each shall have an equal interest in the judgment; or if either of them is dead, then by the survivor.

(2) In suits instituted under this section, it is competent for the defendant for his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency. If the action under this section is brought by the husband or wife of the deceased, the judgment obtained in said action shall be owned by such person as are heirs at law of the deceased under the statutes of descent and distribution, and shall be divided among such heirs at law in the same manner as real estate is divided according to said statute of descent and distribution."

C.R.S. 1973 § 13-21-202:

"Action notwithstanding death. When the death of a person is caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which wold have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured."

C.R.S. 1973 § 13-21-203:

"Limitation on damages. (1) all damages accruing under section 13-21-202 shall be sued for and recovered by the same parties and in the same manner as provided in section 13-21-201, and in every such action the jury may give such damages as

> they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue; and also parties who may be entitled to sue; and also having regard" to the mitigating or aggravating circumstances attending any such wrongful act, neglect, or default; except that if the decedent left neither a widow, widower, nor minor children, nor a dependent father or mother, the damages recoverable in any such action shall not exceed forty-five thousand dollars. No action shall be brought and no recovery shall be had under both section 13-21-201 and section 13-21-202 and in all cases the plaintiff is required to elect under which section he will proceed.
>
> (2) This section shall apply to a cause of action based on a wrongful act, neglect, or default occurring on or after July 1, 1969. A cause of action based on wrongful act, neglect, or default occurring prior to July 1, 1969, shall be governed by the law in force and effect at the time of such wrongful act, neglect, or default.

Statement of the Case

Respondents, as the personal representative of the estate of ARTHUR ESPINOZA and as the children of the decedent, ARTHUR ESPINOZA, filed a Complaint in the District Court for the City and County of Denver which alleged, *inter alia*, that Petitioners O'DELL, GRAHAM, and NEIL, while acting under the color of their authority as Denver police officers, wrongfully shot and killed the father of the Respondent children, ARTHUR ESPINOZA, in Denver on July 30, 1977; that such act was done willfully, maliciously, and with wanton disregard for the rights and feelings of the decedent and his children; that such actions on the part of said police officers deprived the decedent and his children of his rights and their rights, privileges, and immunities as secured by the First, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution, the Constitution of the State of Colorado, and 42 U.S.C. § 1983, for which they were entitled to general and exemplary damages. Petitioners moved to dismiss the Complaint, claiming *inter alia*, that a federal wrongful death remedy did not exist pursuant to 42 U.S.C. § 1983 independent of the Colorado wrongful death remedy and that the Respondents had sought no state wrongful death remedy. The trial court in reliance on *Jones v. Hildebrant*, 191 Colo. 1, 550 P2d 339 (1976), *cert. dismissed*, 432 U.S. 183, 97 S.Ct. 2283, 53 L.Ed.2d 209 (1977), granted Petitioners motion and dismissed the Respondent children's § 1983 claim. The trial court held that a federal wrongful death remedy does not exist under 42 U.S.C § 1983 independent of any state wrongful death remedies, and that the Colorado Wrongful Death Statute is not inhospitable to the underlying policies of these federal causes of action; that because Respondents made no claims pursuant to available state death remedies, the Complaint failed to state a claim upon which relief could be granted. Respondents appealed to the Colorado Court of Appeals, however, the Colorado Supreme Court granted *certiorari* to the Court of Appeals before judgment was entered in said court. Thereafter, the Colorado Supreme Court, *inter alia,* reversed the trial court's dismissal of the Respondent children's § 1983 action, and remanded the case to the trial court, with instructions, *inter alia,* to reinstate the children's § 1983 claims. Such action of the Colorado Supreme Court is the basis for the within petition.

Argument

It is respectfully submitted that the Colorado Supreme Court erroneously reversed the trial court's dismissal of the Respondent children's § 1983 claims. This error arose from that court's unprecedented finding that the surviving children possess a cognizable § 1983 claim because there exists in such surviving children a broad substantive due process interest premised on what that court found to be the children's own constitutional liberty interests in the continuation of their family relationship with their decedent father. This finding was premised on an improper extention of this Court's decision in *Stanley v. Illinois,* 405 U.S. 645, 92 S. Ct. 1208, 31 L.Ed.2d 551 (1972). The Colorado Court held, as follows:

> We recognize that the children of the deceased may assert the violation of a constitutional liberty interest as part of a § 1983 action. Ordinarily, one cannot sue for relief over the deprivation of another's civil rights. *Evain v. Conlisk,* 364 F. Supp. 1188 (D. Ill. 1973), *aff'd,* 498 F.2d 1403 (7th Cir. 1974). But the due process clause of *U.S. Const.* amend XIV, extends constitutional protections to the relationship between parent and child. *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). *See Quilloin v. Walcott,* 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). The parent's liberty interest in the "companionship, care, custody, and management of his or her children" [*Stanley v.*

> *Illinois, supra,* at 651, 92 S.Ct. at 1212], under most circumstances, runs parallel to the child's interest in a continued relationship and association with its parent, upon whom the child is dependent for custody, care, and nuture. *See Wisconsin v. Yoder, supra; Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944). *Cf. Sanchez v. Marchez,* 457 F.Supp. 359 (D. Colo. 1978) (a sibling relationship does not support a * 1983 cause of action).

While the Colorado court correctly recognized that one cannot sue for relief over the deprivation of another's civil rights, it erred in finding that there exists in this case a deprivation of a civil right personal to the children for which the children can sue. The fact is that neither this Court nor any other appellate court has recognized a child's own constitutional right to a continuing family relationship with the parent.

When taking the Colorado court's finding of a constitutional right to a family relationship to its logical extent, a truly absurd result follows: any time a person acting under color of state law affects the continuance of the family relationship in any manner, a personal § 1983 claim arises for every person within the family relationship. Presumably, the family relationship can be so affected by means other than by killing the father. For example, if the father were wrongfully imprisoned, the family relationship would be affected in a constitutional sense in substantially the same manner as the Colorado court has determind in the instant case. Thus, every member of the falsely imprisoned father's family would have their own personal civil right to be vindicated under § 1983. In addition, presumably brothers, sisters and parents of the falsely imprisoned family member would be included within the constitutionally protected right to the continuation of the "family unit", and thus similarly have their personal civil right to be vindicated under § 1983.

If the Colordo holding is left uncorrected, a police officer committing a single wrongful act would be subject to a wholly unforeseeable number of claims of plaintiffs, limited only by the number of persons who constitute the victim's "family." Since it would be each individual family member's constitutional right that was affected, each member would be entitled to recover his own separate damages. The prospect of multiple damage recoveries upon multiple claims against a single police officer for a single wrongful act against a single person cannot be countenanced by this Court.

Having found that a § 1983 claim personal to the decedent's children existed, the Colorado Court went on to erroneously find that the state's wrongful death remedy and attendant net pecuniary loss rule did not limit the right to recover damages in a § 1983 action brought in state court. This holding was premised on that court's conclusion that the limitation on damages in a state wrongful death action did not sufficiently account for the constitutional interest which existed and was claimed by the decedent's children. The Colorado court's rationale was as follows:

> In Colorado the heirs of the deceased have not been denied the right to assert claims for damages. Thus, the asserted purpose of § 1983, to vindicate liberty interests derived from continuing family relationships, has not been entirely defeated at the outset as it would have been if there were no analogous claim for relief in existence under state law. *See Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978).
>
> Nevertheless, the Colorado net pecuniary loss rule limits a wrongful death plaintiff's damages to the financial benefit, if any, which that person might reasonably have expected to receive from the decedent had he lived. * * * In the present case, the wrongful death limitation on damages, if applied to a § 1983 judgment on the children's behalf, would provide no compensation to them for any losses flowing from a variety of associational interests, such as paternal love and care, instruction, counseling, emotional support, and the family's mutual enjoyment of life together. All these deprivations are aspects of the liberty interest which the children of the deceased claim has been violated.
>
> * * * *
>
> The state has adopted a policy of limiting wrongful death recovery to the actual property loss which has been suffered by the heirs of the deceased. This policy serves to negate any possibility of a windfall to the decedent's heirs by denying them compensation for injuries which were not their own. Their property interest is protected, and the common law denial of all damages is avoided.
>
> * * * *

> In this case, more than the property loss of the children is at stake. They allege the deprivation of a constitutional liberty interest in a continuing family relationship. This claim does not seem "logically to be subject to a damages limitation contained in the [Colorado wrongful death] statute permitting survivors to recover for wrongs done to a property interest of theirs." *Jones v. Hildebrant, supra,* 432 U.S. at 188, 97 S.Ct. at 2287. On the contrary, state law is inconsistent with § 1983 to whatever extent it is "inhospitable" to the policies of compensation and deterrence which § 1983 is meant to foster. *Robertson v. Wegmann, supra,* at ____, 98 S.Ct. at 1997. If the state wrongful death limitation on damages were imposed in this case, it would have an "independent adverse effect" on the children's right to compensation for the deprivation of their constitutional liberty inerest in family life. *Id.* Important nonpecuniary aspects of the family relationship would go entirely uncompensated. Therefore, we hold that the plaintiff children are not subject to a net pecuniary loss limitation on their right to recover damages in a § 1983 action brought in state court.
>
> * * * *
>
> The history of § 1983 gives no indication that Congress "meant to establish a deterrent more formidable than that inherent in the award of compensatory damages" [*Carey v. Piphus, supra,* at 256, 98 S.Ct. at 1048], except in cases where exemplary or punitive damages are required "to deter or punish malicious deprivations of rights." *Id.* at 266, 98 S.Ct. at 1054. In this case the children of the deceased allege that they have been maliciously deprived of their rights. We hold that it would be inconsistent with the deterrent policy of § 1983 to bar the award of exemplary or punitive damages in situations where the plaintiffs prove their entitlement to actual damages under § 1983 and prove beyond a reasonable doubt that the defendants acted maliciously or with a wanton and reckless disregard of their rights.

Such reasoning conflicts with this Court's decision in *Robertson v. Wegmann,* 436 U.S. 584, 98 S. Ct. 1991, 56 L.Ed.2d 554 (1978), where even the abatement of a § 1983 claim through application of the state's survival statute was not considered by this Court to be inconsistent with the broad remedial purposes of § 1983. *Cf. Parratt v. Taylor*, ____ U.S. ____, 101 S.Ct. 1908, ____ L.Ed.2d ____ (1981).

Furthermore, Colorado's wrongful death statute provides a means of redress for the deprivation of which the Respondent children complain. As stated by this Court in *Parratt v. Taylor, supra,* 101 S.Ct. at 1917:

> Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process.

The Colorado court's decision was based in part on the mere fact that the state wrongful death statute would not provide Respondents with all of the relief available under § 1983. This rationale is in direct conflict with this Court's decision in *Parratt*.

The questions of federal law presented herein have not been decided by this Court. It is manifest that the Court resolve them. The serious ramifications raised by the Colorado court's unprecedented interpretation of § 1983 and the Fourteenth Amendment warrants the same concern expressed by this Court in *Paul v. Davis*, 424 U.S. 693; 96 S.Ct. 1155, 1159; 47 L.Ed.2d 405 (1976):

> We, too, pause to consider the result should respondent's interpretation of § 1983 and of the Fourteenth Amendment be accepted.

* * * *

> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent.

As in *Paul v. Davis, supra,* the Colorado court's § 1983 and Fourteenth Amendment interpretation requires this Court to pause to consider the result if this Court should fail to settle this issue, because it is equally hard to perceive any logical stopping place to that court's line of reasoning. It would equally surprise the drafters of that Amendment to learn that it worked the probable results aforementioned herein. Nor do the Court's decisions support the Colorado construction. Petitioners respectfully urge this Court to grant their petition.

Respectfully submitted,

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Appendix

Appendix

A. Opinion of the Colorado Supreme Court (No. 79SC5) as reported at 10 *The Colo. Lawyer* 1721 (1981).

B. Order of the Colorado Supreme Court dated June 8, 1981 modifying the opinion and denying the Petition for Rehearing.

Appendix A

No. 79SC5

Andrew Espinoza, Individually and as Personal Representative of the Estate of Arthur Espinoza, and as Guardian of Jeanne Espinoza and Judith Espinoza, Minors; Arthur Espinoza, Jr., Barry Espinoza, and Beverly Espinoza, Heirs-at-Law of the Deceased, and the Estate of Arthur Espinoza, Deceased,
Plaintiffs-Appellants,
v.
John O'Dell, Gary Graham and David Neil, Arthur Dill, Chief of Police of the City of Denver, and the City and County of Denver,
Defendants-Appellees.

May 4, 1981
En Banc

Appeal from the District Court of the City and County of Denver, Hon. Clifton A. Flowers, Judge. Affirmed in part, reversed in part, and remanded with directions.

Gerash & Springer, P.C., Scott H. Robinson, Denver, Colorado, for petitioners.

Chesler and Makaroff, Michael V. Makaroff, Denver, Colorado, for defendants-appellees John O'Dell and Gary Graham.

Bruno, Bruno and Bruno, Louis B. Bruno, Denver, Colorado, for defendant-appellee David Neil.

Max P. Zall, City Attorney, Lloyd K. Shinsato, Assistant City Attorney, Gregory C. Denton, Assistant City Attorney, Don K. DeFord, Assistant City Attorney, Denver, Colorado, for defendants-appellees Arthur Dill and the City & County of Denver.

JUSTICE ROVIRA delivered the opinion of the Court.

This is an appeal from the dismissal of a complaint which asserted claims on behalf of the estate of Arthur Espinoza. by the personal representative of the estate, and by the children of Arthur Espinoza, who are his heirs at law, against three police officers, the Chief of Police of Denver, and the City and County of Denver.[1]

The complaint alleged:

(1) that defendants O'Dell, Graham, and Neil, while acting under the color of their authority as Denver police officers, wrongfully shot and killed Arthur Espinoza in Denver on July 30, 1977, and that such act was done willfully, maliciously, and with wanton disregard for the rights and feelings of the decedent and his children;

(2) that the three officers and Chief of Police Dill, while acting under color of law and as servants and employees of the City and County of Denver. conspired to intentionally deprive Arthur Espinoza. his estate, and his children of their rights, includin decedent's right to life, his children's right to their father's continued life, equal protection of the law and due process of the law;

(3) that such actions on the part of the defendants deprived the decedent and his children of his and their rights, privileges, and immunities as secured by the First, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution, the Constitution of the State of Colorado, and 42 U.S.C. 1983 and 1985;

(4) that as a direct and proximate consequence of the defendant's actions, the plaintiffs were entitled to general damages in the amount of $2 million, an undetermined amount as special damages, and reimbursement for funeral and burial expenses.

The police officer defendants urged dismissal of the complaint, claiming *inter alia*, that "a federal wrongful death remedy does not exist pursuant to 42 U.S.C 1983 or 1985 independent of the Colorado wrongful death remedies" and that the plaintiffs had sought no state wrongful death recovery in this case.

The Chief of Police and the City and County of Denver also moved to dismiss the complaint and, in addition to the grounds stated by the other defendants, argued that the Chief of Police was not liable under the doctrine of *respondeat superior* for the acts of his subordinates and that the City and County of Denver is not a "person" under 42 U.S.C. 1983 and 1985.

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[1] The writ of certiorari was issued to the Court of Appeals before it rendered judgment. *See* C.A.R. 50.

The trial court in reliance on *Jones v. Hildebrant,* 191 Colo. 1, 550 P.2d 339 (1976), *cert. dismissed,* 432 U.S. 183, 97 S.Ct. 2283, 53 L.Ed.2d 209 (1977), granted the motions to dismiss, holding that a federal wrongful death remedy does not exist under 42 U.S.C 1983 or 1985 independent of state wrongful death remedies, that the Colorado Wrongful Death statute is not "inhospitable" to the underlying policies of these federal causes of action, and that, since the plaintiffs made no claims pursuant to available state death remedies, the complaint failed to state a claim upon which the relief prayed for could be granted.

The trial court also ruled that the defendant Dill could not be held liable under the doctrine of *respondeat superior,* and that the City and County of Denver was a municipality and not a "person" and therefore not amenable to suit under § 1983.

We reverse the trial court's dismissal of the plaintiff's § 1983 action, affirm its dismissal of the plaintiff's claims based on 42 U.S.C. 1985, affirm its dismissal of claims against the City and County of Denver and against Dill, and direct it to allow further amendment of the pleadings as the interests of justice require.

I. 42 U.S.C. § 1983

This case raises a number of questions relating to the nature and scope of claims arising under 42 U.S.C § 1983 in state courts.[2] This federal statute derives from § 1 of the Civil Rights Act of 1871 and was enacted under the power vested in Congress by § 5 of the Fourteenth Amendment to the United States Constitution. Broadly described, the intent of § 1983 was to create a civil remedy for persons who prove that one acting under color of state law has illegally deprived them of rights guaranteed by the federal constitution or by federal law. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Ter-

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[2] State courts have concurrent jurisdiction to entertain claims brought under 42 U.S.C. § 1983. *Maine v. Thiboutot,* ___ *U.S.* ___ , *100 S.Ct. 2502,* ___ *L.Ed.2d* ___ *(1980); Martinez v. California,* 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980). The courts of Colorado have accepted jurisdication of this statutory cause of action. *Thorpe v. Durango School District,* 41 Colo. App. 473, 591 P.2d 1329 (1979), *aff'd,* ___ Colo. ___ , 614 P.2d 880 (1980).

> rritory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Standing alone, § 1983 provides no protection for civil rights because it creates no independent substantive rights at all. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 99 S.Ct. 1095, 60 L.Ed.2d 508 (1979). By its plain terms, the statute extends liability to those who, under color of state authority, deprive others of "any rights, privileges, or immunities secured by the Constitution and [federal] laws." Its language includes no description of the type of remedies or punishments which it violation entails. Instead, as this court recognized in *Jones v. Hildebrant, supra,* a right based upon a violation of § 1983 was intended by Congress to be vindicated by means of remedies and punishments established under state law, at least so far as the state law is not "inconsistent with the Constitution and laws of the United States."[3] 42 U.S.C. § 1988. *See Robertson v. Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978); *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973).[4]

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[3] 42 U.S.C. § 1988 provides in pertinent part as follows:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but *in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdication of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause*, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. (Emphasis added.)

[4] Although the need to refer to state remedies and limitations in § 1983 actions, as an initial matter, is clear under the federal statutory scheme because § 1983 lacks specific provisions which furnish remedies or set limitations, the nature of "inconsistency" between state and federal law is not completely clear. The proper application of 42 U.S.C. § 1988, as a choice of law provision, is itself a subject of some controversy. *See Board of Regents v. Tomanio*, ____ U.S. ____, 100 S.Ct. 1790, ____ L.Ed.2d ____ (1980) (Brennan, J., dissenting); *Robertson v. Wegmann, supra* (Blackmun, J., dissenting); *Jones v. Hildebrant, supra* (White, J., dissenting). *See also* Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 *U. Pa. L. Rev.* 499 (1980).

We find that the trial court erred in ruling that a state wrongful death action was the plaintiff's sole method of recovery in Colorado.[5] In order to guide the trial court in its conduct of proceedings on remand, we go on to determine whether any of the plaintiffs in this case are entitled to assert a claim for relief under § 1983 that allows a recovery of damages different from the remedies and limitations that apply to plaintiffs who might bring a comparable claim for relief under state law alone. We distinguish two possible state statutes which bear upon this question: (1) a claim for wrongful death, arising under § 13-21-202, C.R.S. 1973, brought by surviving parties whose claim is based upon a fatal injury done to the deceased;[6] and (2) a survival action brought under § 13-20-101, C.R.S. 1973, by the deceased's personal representative for the benefit of the state.[7]

In order to answer the question of remedies and limitations, we must determine whether existing state law is inconsistent with the federal policies underlying § 1983. To the extent that any fundamental inconsistency exists between the state and federal policies, a claimant under § 1983 is not limited to recovery under state law; and separate rules for recovery, consistent with federal policies, must be adopted. *See Robertson v. Wegmann, supra.*

A. *The Claim for Relief*

Relying on its interpretation of our decision in *Jones v. Hildebrant, supra,* the trial court ruled that a state wrongful death action was the plaintiff's sole means of recovery. The plaintiffs did not claim damages under the wrongful death statute, but instead based their claim on § 1983 alone. Therefore, the court dismissed their suit.

In *Jones v. Hildebrant, supra,* the mother of the decedent stated three claims for relief in her suit: (1) battery, (2) negligence, and (3) violation of civil rights. The first two claims were based on the wrongful death statute, and the third claim was premised on § 1983. No survival action was brought by the personal representative of the deceased. In accordance with the provisions of 42 U.S.C. § 1988, we held that the state's wrongful death remedy was identical to the remedy which would be engrafted upon a § 1983 action in a federal court. For purposes of § 1983 actions in state court, we held that the substantive claims "merged," and we affirmed the trial court's dismissal of the § 1983 claim.[8]

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[5] *See* Part I(A) of this opinion, *infra.*

[6] *See* Part I(B) of this opinion, *infra.*

[7] *See* Part I(C) of this opinion, *infra.*

The present case may be distinguished from *Jones* in two significant respects: (1) the plaintiffs here have proceeded soley under claims that their federal rights have been violated, and (2) the personal representative of the decedent has here brought an action on behalf of the decedent himself.

Rights of action are to "merge" when a peson takes or acquires a remedy of a higher nature, in legal estimation, than the one which he already possesses for the same right, thus causing his remedies in respect to the minor right to be absorbed in those attaching to the higher one. *Black's Law Dictionary* at 1140 (Revised 4th ed., 1968). In *Jones* the application of this principle led to a dismissal of the federal claim. However, in this case the plaintiffs have elected to pursue their § 1983 claim apart from all available state-created claims for relief. The issue of the relative superiority of the claims is thus not relevant to the question of whether the plaintiffs can state an independent federal claim for relief.[9] This is merely to say that no merger allowing the dismissal of their federal claim for relief has occurred.

In *Jones* we did not hold that a state wrongful death action is the exclusive method of recovery for one who raises a § 1983 claim for inquiries caused to a decedent. Rather, the case stands for the proposition that where a state wrongful death claim is joined with a federl

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[8] When *Jones* was decided, the § 1983 plaintiff was completely barred from recovering from the municipality that employed the police officer defendants. At that time, the state wrongful death action provided the plaintiff a "broader remedy" than would have been permitted here under § 1983. *Id.*, 191 Colo. at 7, n. 7, 550 P.2d at 344. *but see* Note, *Damages in Section 1983 Action Controlled by State Law: Jones v. Hildebrant*, 55 *Den. L. J.* 291 (1978).

Since our decision in *Jones*, the immunity status of municipal defendants has readically altered. *Compare Owen v. City of Independence*, ____ U.S. ____, 100 S.Ct. 1398, ____ L.Ed.2d ____ (1980) *and Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) *with Moor v. County of Alameda, supra, and Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 492 (1961). *See* Part II of this opinion, *infra*. Furthermore, 42 U.S.C. § 1988 has been amended to permit recovery of attorney's fees and expenses as a part of the damage award in a successful § 1983 action. Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641 [codified as the second sentence of 42 U.S.C. § 1988 (1976)]. This provision of § 1988 has been applied to § 1983 claims brought in state court as well as those pursued in federal court. *Main v. Thiboutot, supra*, n. 2. *See Thorpe v. Durango School District, supra*, n. 2.

[9] As our discussion in footnote 8, *supra*, indicates, a comparison of the state and federal claims for relief would require a consideration of a variety of factors which did not exist when *Jones* was decided. The continuing validity of its merger rule is in serious doubt.

§ 1983 claim, the federal claim may be dismissed. *Jones* said nothing about the right of a personal representative to institute a survival action; such a claim was not even a feature of the case. A child's right to institute a § 1983 claim independent of any state wrongful death remedy was simply not addressed.

In order to state a claim for relief under § 1983, all that a plaintiff need allege is (1) that some person deprived him of a federal right and (2) that this person acted under color of state law. *Gomez v. Toledo*, ____ U.S. ____, 100 S.Ct. 1920, ____ L.Ed.2d ____ (1980). Applying this standard to the present case, we find that the plaintiffs' pleadings are clearly sufficient to state a claim for relief. The trial court erred in dismissing the claim.

However, the mere right to bring a § 1983 action says nothing about the remedies and limitations which may apply to such a case. To make these determintions, we go on to consider the present § 1983 action in relation to analogous state claims for relief.

There are two classes of plaintiffs in the present suit who have claimed that they have been deprived of federal constitutional rights by the allegedly illegal killing of Arthur Espinoza by Denver police officers: (1) the decedent's personal representative, acting on behalf of the estate and (2) the decedent's children, as heirs at law, on the basis of their own constitutional liberty interests in the continuation of their family relationship with the decedent.[10] We treat each of these aspects of the plaintiffs' § 1983 claim separately.

B. Wrongful Death

At common law, the traditional rule was that an injured party's personal and derivative tort claims were extinguished upon his death. *S. Speiser, Recovery for Wrongful Death*, §§ 1:1 to 1:4 (2d ed. 1975); *W. Prosser, Handbook of the Law of Torts* § 126 (4th ed. 1971); *Robertson v. Wegmann, supra*. State statutes were enacted to ameliorate the consequences of this harsh rule.

In Colorado two methods of recovery have been authorized when an injured party has died: (1) a "survival" action may be brought for the benefit of his estate pursuant to § 13-20-101, C.R.S. 1973,[11] and (2) a wrongful death action may be brought by certain statutorily enumerated persons whose claim is based upon the fatal injury done to the deceased pursuant to § 13-21-202, C.R.S. 1973. The class of plaintiffs who may bring suit under the latter statute is listed in § 13-21-201(1)(a)(b) and (c), C.R.S. 1973; and for the sake of convenience, we will refer to them as "heirs of the deceased" or "children of the deceased."

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[10] The plaintiffs claim numerous other constitutional deprivations which we do not find necessary to address. The broad substantive due process interest which we hold to be cognizable here subsumes these other claimed rights in every sense that we now find meaningful.

[11] *See* Part I(C) of this opinion, *infra*.

In the present case, the children of the deceased claim an interest in his life, for purposes of § 1983, which corresponds by analogy to the interest claimed by the heirs of the deceased in an action brought under our wrongful death statute. *See Jones v. Hildebrant, supra.*

Section 13-21-202, C.R.S. 1973, provides:

> When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensured, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensured, shall be liable in an action for damages notwithstanding the death of the party injured.

The breach of duty to be established under the statute is that owed by the tort-feasor to the deceased, not that owed to the heirs of the deceased. However, the loss which forms the basis for the suit is that suffered by the heirs. *See S. Speiser, supra,* § 2:1 at 66. The wrongful death statute creates a claim for relief and an "entitlement" to damages for parties who have not themselves been directly injured by the actions of the tort-feasor. *Fish v. Liley,* 120 Colo. 156, 164, 208 P.2d 930, 934 (1949).

A plaintiff in a Colorado wrongful death action has been limited in damages to his net pecuniary loss. *See, e.g., Pollock v. City and County of Denver,* 194 Colo. 380, 572 P.2d 828 (1977); *Jones v. Hildebrant, supra; Kogul v. Sonheim,* 150 Colo. 316, 372 P.2d 731 (1962); *Hebertson v. Russell,* 150 Colo. 110, 371 P.2d 422 (1962). The deprivation suffered by the heirs of the deceased — the proper measure of their damages — has been considered their "property loss," with no additional compensation for the personal injury they claim to have suffered. *Fish v. Liley, supra.*

In the present case, the children of the deceased assert the deprivation of their own personal constitutional liberty interest in the continued life of their father and in continuance of their family relationship. *See Mattis v. Schnarr,* 502 F.2d 588 (8th Cir. 1974); Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983,* 51 *So. Cal. L. Rev.* 355 (1978). They claim that the termination of their family relationship amounts to the violation of a constitutional liberty and, therefore, they are entitled to an award of damages beyond what would be available to them based on their property loss alone.

We recognize that the children of the deceased may assert the violation of a constitutional liberty interest as part of a § 1983 action. Ordinarily, one cannot sue for relief over the deprivation of another's civil rights. *Evain v. Conlisk*, 364 F. Supp. 1188 (D. Ill. 1973), *aff'd*, 498 F.2d 1403 (7th Cir. 1974). But the due process clause of *U.S. Const.* amend XIV, extends contitutional protections to the relationship between parent and child. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). *See Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1979). The parent's liberty interest in the "companionship, care, custody, and management of his or her children" [*Stanley v. Illinois, supra*, at 651, 92 S.Ct. at 1212], under most circumstances, runs parallel to the child's interest in a continued relationship and association with its parent, upon whom the child is dependent for custody, care, and nurture. *See Wisconsin v. Yoder, supra; Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944). *Cf. Sanchez, v. Marchez*, 457 F.Supp. 359 (D. Colo. 1978) (a sibling relationship does not support a § 1983 cause of action).

Our present task is to assess whether, as required by 42 U.S.C. § 1988, "the common law, as modified and changed by the constitution and statutes" of this state, furnishes suitable remedies to vindicate the liberty interest that has been asserted.

In Colorado the heirs of the deceased have not been denied the right to assert claims for damages. Thus, the asserted purpose of § 1983, to vindicate liberty interests derived from continuing family relationships, has not been entirely defeated at the outset as it would have been if there were no analogous claim for relief in existence under state law. *See Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978).

Nevertheless, the Colorado net pecuniary loss rule limits a wrongful death plaintiff's damages to the financial benefit, if any, which that person might reasonably have expected to receive from the decedent had he lived. *E.g., Herbertson v. Russell, supra*. In the present case, the wrongful death limitation on damages, if applied to a § 1983 judgment on the children's behalf, would provide no compensation to them for any losses flowing from a variety of associational interests, such as paternal love and care, instruction, counseling, emotional support, and the family's mutual enjoyment of life together. All these deprivations are aspects of the liberty interest which the children of the deceased claim has been violated.

We must decide whether the limitation on damages in a wrongful death action sufficiently accounts for the constitutional interest claimed by the children of the deceased. A state's existing measure of compensation for a decedent's injuries is not necessarily the "complete solution" to damage inquiries in a § 1983 action. *Carey v. Piphus, supra*, at 258, 98 S.Ct. at 1049.

> In order to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question — just as the common law rules of damages themselves were defined by the interests protected in the various branches of tort law. *(Id.* at 258-59, 98 S.Ct. at 1050.)

The state and federal policies which the respective legislatures sought to foster must be identified and compared. *Board of Regents v. Tomanio, supra*, n. 4. The substantive limitations which the state has established in regulating the award of damages may be weighed against the federal right asserted and the type of injury alleged in order to discover if the state policy mandating limitations is inconsistent with the federal policy allowing compensation. *See id.; Robertson v. Wegmann, supra; Carey v. Piphus, supra.*

The state has adopted a policy of limiting wrongful death recovery to the actual property loss which has been suffered by the heirs of the deceased. This policy serves to negate any possibility of a windfall to the decedent's heirs by denying them compensation for injuries which were not their own. Their property interest is protected, and the common law denial of all damages is avoided.

However, a person's right to recover damages under § 1983 must be evaluated in light of distinctly different concerns. The two principal policies underlying a § 1983 action for deprivation of federal rights are compensation and deterrence. *Robertson v. Wegmann, supra.* Where the government itself becomes the source of danger to an individual's rights, in the absence of some effective mode of redress, the person would be defenseless in the face of official lawlessness. The § 1983 remedy serves to supplement available state remedies. *Monroe v. Pape, supra*, n. 8. Because the wrongdoer acts with special authority under color of his governmental office or employment, the danger of his misuse of power is greater for those subject to it than would be the case if the wrongdoer were acting merely as an individual. His potential liability for violation of another's federal rights serves to restrain illegal behavior and to encourage good faith performance of official duties.

In this case, more than the property loss of the children is at stake. They allege the deprivation of a constitutional liberty interest in a continuing family relationship. This claim does not seem "logically to be subject to a damages limitation contained in the [Colorado wrongful death] statute permitting survivors to recover for wrongs done to a property interest of theirs." *Jones v. Hildebrant, supra,* 432 U.S. at 188, 97 S.Ct. at 2287. On the contrary, state law is inconsistent with § 1983 to whatever extent it is "inhospitable" to the policies of compensation and deterrence which § 1983 is meant to foster *Robertson v. Wegmann, supra,* at ___ , 98 S.Ct. at 1997. If the state wrongful death limitation on damages were imposed in this case, it would have an "independent adverse effect" on the children's right to compensation for the deprivation of their constitutional liberty interest in family life. *Id.* Important nonpecuniary aspects of the family relationship would go entirely uncompensated. Therefore, we hold that the plaintiff children are not subject to a net pecuniary loss limitation on their right to recover damages in a § 1983 action brought in state court. We overrule our decision in *Jones v. Hildebrant, supra,* to the extent it implied that state wrongful death limitations must be applied to a federal § 1983 claim brought by children of the deceased who allege the deprivation of a constitutional liberty in their continuing relationship with the one whose life has been unlawfully taken under color of state law.

The history of § 1983 gives no indication that Congress "meant to establish a deterrent more formidable than that inherent in the award of compensatory damages" [*Carey v. Piphus, supra,* at 256, 98 S.Ct. at 1048], except in cases where exemplary or punitive damages are required "to deter or punish malicious deprivations of rights." *Id.* at 266, 98 S.Ct. at 1054. In this case the children of the deceased allege that they have been maliciously deprive of their rights. We hold that it would be inconsistent with the deterrent policy of § 1983 to bar the award of exemplary or punitive damages in situations where the plaintiffs prove their entitlement to actual damages under § 1983 and prove beyond a reasonable doubt that the defendants acted maliciously or with a wanton and reckless disregard of their rights. *See Colo. J.I.* (Civ.2d) 5:3 (1980). *Cf. Herbertson v. Russell, supra.*

We note that the defendant police officers in this case are entitled to raise the issue of a "qualified immunity" in their defense. *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). If they performed their duty with a reasonable, good faith belief in the propriety of their actions, they are not subject to damages. *Procunier v. Navarette,* 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978); *Wood v. Strickland,* 420 U.S. 380, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). A defendant's mere negligence or inadvertent conduct does not support an action under § 1983. *Procunier v. Navarett, supra.*

Nevertheless, our holding thast general compensatory damages and punitive damages are available to the children of the deceased is premised on the allegations raised in their pleadings. They have stated a claim upon which relief may be granted, and their potential relief is not subject to the net pecuniary loss limitation of the state wrongful death statute.

C. Survival

Section 13-20-101(1), C.R.S. 1973, provides as follows:

> All causes of action, except actions for slander or libel, shall survive and may be brought or continued notwithstanding the death of the person in favor of or against whom such action has accrued, but punitive damages shall not be awarded nor penalties adjudged after the death of the person against whom such punitive damages or penalties are claimed; and in tort actions based upon personal injury, the damages recoverable after the death of the person in whose favor such action has accrued shall be limited to loss of earnings and expenses sustained or incurred prior to death, and shall not include damages for pain, suffering, or disfigurement, nor prospective profits or earnings after date of death. An action under this section shall not preclude an action for wrongful death under part 2 of article 21 of this title.

By this statute's express terms, with the exception of defamation, all tort actions survive the death of the injured party. But in "tort actions based upon personal injury," the statute limits damage awards to "loss of earnings and expenses sustained or incurred prior to death," specifically excluding damages for "pain, suffering, or disfigurement" and for "prospective profits or earnings after date of death."

The personal representative of the decedent's estate, by necessity, stands in the decedent's shoes in a state survival action. *Publix Cab Co. v. Colorado National Bank*, 139 Colo. 205, 338 P.2d 702 (1959). *See* § 13-20-101(2), C.R.S. 1973. In this case, the personal representative joined as a plaintiff in prosecuting a § 1983 action on behalf of the deceased. *Cf. Jones v. Hildebrant, supra.*

A surviving tort claim under § 13-20-101(1) need not bear a causal relation to the decedent's death. In contract to a wrongful death action, the decedent's death is not the event which triggers the creation of the claim. Rather, suit is brought in spite of the injured party's death "to prevent certain actions or causes of action *already accrued* from abating by reason of the death of either of the parties."

Brown v. Stookey, 134 Colo. 11, 14, 198 P.2d 955, 957 (1956) (original emphasis). The estate, not the deceased himself, is the real beneficiary of the surviving cause of action, which serves to compensate the estate for actual property losses it has incurred. *See Publix Cab Co. v. Colorado National Bank, supra; Kling v. Phayer*, 130 Colo. 158, 274 P.2d 97 (1954). The personal representative "owns the action for the benefit of the estate." *Salazar v. Dowd*, 256F.Supp. 220, 223 (D. Colo. 1966).

As the present case now stands, a § 1983 action brought in state court can fully compensate the surviving children for both their economic and associational losses. *See* Part I(B) of this opinion, *supra*. Because the underlying policies of § 1983 have been implemented, it is unnecessary to determine whether any inconsistency exists between the state survival statute's damage limitations and the remedies required under § 1983. *See* 42 U.S.C. § 1988. The personal representative, who in this capacity alone has no constitutionally protected interest in the life of the decedent, is here properly limited to the damages set forth in the state survival statute. *Salazar v. Dowd, supra*.

II. Municipal Liability

The trial court, in addition to ruling that a wrongful death action was the sole remedy available to the plaintiffs, held that the defendant municipality had complete immunity from a § 1983 suit under the precedent of *Monroe v. Pape, supra*, n. 8. The parties did not bring to the court's attention the question of whether, pursuant to a proper complaint under § 1983, the defendant City and County of Denver is amenable to suit for constitutional deprivations resulting from formal or informal policies adopted by means of its "official decisionmaking channels." *Monell v. New York City Dept. of Social Services, supra*, n. 8, overrulling in part, *Monroe v. Pape, supra*, n. 8. *See Owen v. City of Independence, supra*, n. 8.

Unless it appears to a reasonable certainty that no set of facts supports a plaintiff's § 1983 claim against a municipality, a court should be wary of dismissing the case on pleadings which involve an alleged violation of constitutional rights. *See Davidson v. Dill*, 180 Colo. 123, 503 P.2d 157 (1972); *Sprott v. Roberts*, 154 Colo. 252, 390 P.2d 465 (1964).

Here, the plaintiffs made no factual allegations regarding the official decision making of the municipality. We have no doubt, therefore, that it is deficient as a matter of law. The doctrine of *respondeat superior* provides no basis for rendering municipalities liable under § 1983 for the constitutional torts of their employees.

Monell v. New York City Dept. of Social Services, supra, n. 8.

Nevertheless, on remand, further amendment of the plaintiffs' § 1983 claim may be allowed as a matter within the sound discretion of the trial court, if it finds that justice so requires. C.R.C.P. 15(a). *Varner v. District Court,* ___ *Colo.* ___ , *618 P.2d 1388 (1980); Fisher v. District Court,* 193 Colo. 24, 561 P.2d 1266 (1977); *Coon v. Guido,* 170 Colo. 125, 459 P.2d 282 (1969).

III. Civil Conspiracy

The trial court dismissed the plaintiff's claims based upon 42 U.S.C. § 1985(c) for the same reason that it dismissed their § 1983 claim — the availability of a state wrongful death remedy. It also held that the civil conspiracy claim made available to plaintiffs under § 1985 could not be posited on a theory of vicarious liability. We agree with the latter proposition of law relied on by the trial court, and we also affirm its order on another ground.

A. 42 U.S.C. § 1985

In reviewing the action of atrial court in dismissing a complaint for failure to state a claim, an appellate court is in the same position as the trial judge. *McDonald v. Lakewood Country Club,* 170 Colo. 355, 461 P.2d 437 (1969). The court must consider only matters stated within the four corners of the pleading. *Gayton v. Department of Highways,* 149 Colo. 72, 367 P.2d 899 (1962); *Dillinger v. North Sterling Irrigation District,* 135 Colo. 100, 308 P.2d 608 (1957).

A complaint under § 1985(3)[12] must allege sufficent facts to show:

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[12] Title 42 U.S.C. § 1985(3) provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by forece, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persond engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

> that the defendants did (1) "conspire or go in disguise on the highway or on the premises of another" (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person of [sic] property" or (4b) "deprived of having and exercising any right privilege of a citizen of the United States," [*Great American Federal Savings & Loan Ass'n v. Novotny*, ___ U.S. ___, ___, 99 S.Ct. 2345, 2349, ___ L.Ed.2d ___ (1979), quoting *Griffing v. Breckenridge*, 403 U.S. 88, 102-03, 91 S.Ct. 1790, 1798-99, 29 L.Ed.2d 338 (1971).]

The trial court found that, apart from the allegations which supporte dthe plaintiffs' § 1983 action against the defendant police officers, the existence of a conspiracy among the officers, defendant Dill, and through them the defendant municipality, was nother more than an assertion of *respondeat superior* liability.

> [M]unicipal officers cannot be held vicariously liable for the constitutional misdeeds of their subordinates. Liability [for § 1985 violations] can only be imposed on these officers if they participated in the wrongful acts, or knew or should have known that the wrongful acts were taking place and acquiesced therein. [*Preston v. City of York*, 452 F. Supp. 52, 54 (M.D. Pa. 1978).]

Fisher v. Volz, 495 F.2d 333 (3d Cir. 1974). Beyond its facial assertion of the fact of a "conspiracy," the plaintiffs' amended complaint is devoid of any factual allegations which, taken to be true, would support the inference that an agreement existed among all the defendants to deprive the decedent of his rights. *See Taylor v. Mitzel*, 82 Cal. App.3d 665, 147 Cal. Rptr. 323 (1978); *Preston v. City of York, supra; Burnett v. Short*, 441 F.2d 405 (5th cir. 1971).

Further, the complaint was deficient in another fundamental respect. In *Griffin v. Breckenridge, supra*, the United States Supreme Court found that Congress intended to prevent § 1985(3) from applying to "all tortious conspiratorial interfereneces with the rights of others," and thereby did not intend to create a general federal law of tort. *Id.* at 102, 91 S.Ct. at 1798. As a consequence, a complaint alleging purposeful intent to discriminate must be founded upon "some racial, or perhaps otherwise class-based invidiously discriminatory animus." *Id.* In the present case no such allegation was made. The overwhelming weight of authority holds that a failure to allege a defendant's invidious discriminatory animus is a failure to state a claim under § 1985(3). *Briley v. State of Californ*, 564 F.2d 849 (9th Cir. 1977); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977); *Kermit Construction Corp. v. Banco Credito*, 547 F.2d 1 (1st Cir. 1976); *Hazo v. Geltz*, 537 F.2d 747 (3d Cir. 1976); *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69 (8th Cir. 1976).

We affirm the trial court's order dismissing the plaintiffs' cause of action brought under 42 U.S.C. § 1985.

B. Conspiracy Under § 1983

The plaintiffs did not specifically allege a civil conspiracy claim pursuant to § 1983, but we address this issue in keeping with our overall review of the adequacy of the complaint.

Discriminatory purpose is not essential to the statement of a conspiracy claim under § 1983. *Cohen v. Norris*, 300 F.2d 24 (9th Cir. 1962). *See Monroe v. Pape, supra*, n. 8. The elements of such a claim are as follows: (1) that the defendants conspired together, (2) the defendants acted under color of state law, (3) that defendants deprived plaintiffs of a federal right, and (4) that overt acts were done pursuant to the conspiracy which caused damage to the plaintiffs. *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959), *overruled on another issue, Cohen v. Norris, supra*.

In order for a complaint to allege a conspiracy under § 1983, the overt act must be casually linked to the defendants' agreement to deprive the plaintiffs of a federal right under color of state law. The complaint must

> set forth with certainty facts showing particularly what defendant or defendants did to carry the conspiracy into effect, whether such acts fit within the framework of the conspiracy alleged, and whether such acts, in the ordinary course of events, would proximately cause injury to the plaintiff. [*Martin Hodas v. Lindsay*, 431 F.Supp. 637, 643-44 (S.D.N.Y. 1977); *Hoffman v. Halden, supra*, at 295.]

In the present complaint, no facts have been alleged to support the municipality's liability for § 1983 civil conspiracy. *Monell v. New York City Dept. of Social Services, supra*, n. 8. On the other hand, the common participation of the defendant police officers, O'Dell, Graham, and Neil, in the overt act of the conspiracy — the shooting of

Arthur Espinoza — is asserted in a clear and striking manner.[13] The close question presented in the form of the present complaint is whether "specific facts" have been alleged to support a § 1983 conspiracy claim against the defendant Dill. *See Sanchez v. Marchez, supra; Salazar v. Dowd, supra.*

The only allegation linking Dill to any role within the conspiracy, to the conspiracy's framework in relation to its overt act, or to the overt act itself is the conclusory assertion that he "conspired" with the defendant police officers. This says something, but not enough.

On remand, the trial court should allow the plaintiffs to amend their complaint to dispel any confusion about the statutory basis of their civil conspiracy claim. We note, however, that the plaintiffs would have to plead more than their present "[g]eneral allegations of a conspiracy which are unsupported by facts" [*Sanchez v. Marchez, supra,* at 364] in order to join Dill and the City and County of Denver as defendants in a § 1983 claim for civil conspiracy.

IV. Conclusion

We reverse the tiral court's ruling dismissing the plaintiffs' action brought under 42 U.S.C. § 1983 and remand this case to the tiral court with instructions that it reinstate the claims brought on behalf of Arthur Espinoza by his personal representative and by Arthur Espinoza's children, who assert that they have been illegally deprived of their constitutional liberty interest in a continuing family relationship.

We affirm the trial court's order dismissing the plaintiffs' claim based on 42 U.S.C. § 1985.

The court should allow amendment of the plaintiffs' complaint to allege a claim for relief for civil conspiracy under 42 U.S.C. § 1983; and if plaintiffs have grounds to believe that their constitutional deprivation resulted from formal or informal policies adopted by means of the municipality's official decision-making channels, they may include the City and County of Denver as a party defendant.

---

[13] The overt act for the conspiracy is contained in the plaintiffs' statement of their first § 1983 claim for relief and incorporated by reference in their second conspiracy claim for relief:

> That on or about July 30, 1977, at or near 31st and Curtis Streets, in Curtis Park, located in Denver, Colorado, the Defendants, O'Dell, Graham, and Neil, wrongfully shot and killed the decedent, Arthur Espinoza, while he was lying on the ground unarmed, and that such actions were undertaken willfully, maliciously, wantonly, recklessly, and with a willful and wanton disregard for the rights and feelings of the decedent, Arthur Espinoza, and his heirs at law, the Plaintiffs herein.

Chief Justic Hodges and Justice Erickson specially concur in the result.

Justice Erickson specially concurring in the result:

Jones v. Hildebrant, 191 Colo. 1, 550 P.2d 339 (1976), was the subject of review by the Supreme Court of the United States at least to the extent that an opinion was issued dismissing certiorari as being improvidently granted. Justice White, joined by Justices Brennan and Marshall, dissented from the dismissal of certiorari. *Jones v. Hildebrant,* 432 U.S. 183, 97 S.Ct. 2283, 53 L.Ed.2d 209 (1977). *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 70 S.Ct. 252, 94 L.Ed. 562 (1950), stands as precendent for the proposition that the denial of certiorari review only signifies that the case before the Supreme Court of the United States was not properly postured for review. The opinion authored by Justice Rovira overrules *Jones v. Hildebrant, supra,* and suggests that Colorado courts may grant broad relief under an omnibus constitutional tort claim which finds its genesis in the Civil Rights Act of 1871 and 42 U.S.C. § 1983.

The suggested remedies included in Justice Rovira's opinion are not necessary to reach the result in this case. This Case should not address or seek to resolve issues which are not properly before us and which do not constitute an actual case or controversy. It is not our province to give legal advice.

Accordingly, I concur in the result. The trial court erred in ruling that a state wrongful death action was the plaintiff's sole method of recovery in Colorado. I also agree that the trial court properly dismissed the claims against the Chief of Police, Arthur Dill, and against the City and County of Denver. Dismissal of the claims predicated on 43 U.S.C. § 1985 was also proper under the record which is before us.

Chief Justice Hodges joins me in this special concurrence.

Appendix B

No. 79SC5

ANDREW ESPINOZA, individually and as Personal Representative of the Estate of Arthur Espinoza, deceased, and as guardian of JEANNE ESPINOZA and JUDITH ESPINOZA, minors; ARTHUR ESPINOZA, JR., BARRY ESPINOZA, and BEVERLY ESPINOZA, heirs-at-law of the deceased, and the ESTATE OF ARTHUR ESPINOZA, Deceased,

Plaintiffs-Appellants,
vs.

JOHN O'DELL, GARY GRAHAM and DAVID NEIL, ARTHUR DILL, Chief of Police of the City OF Denver, and THE CITY AND COUNTY OF DENVER,

Defendants-Appellees.

ORDER

Upon consideration of the Petition for Rehearing filed by the Defendants-Appellees in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that the Opinion is Modified, and as Modified, the Petition for Rehearing shall be, and the same hereby is, Denied.

BY THE COURT, EN BANC, JUNE 8, 1981.

[The following was attached to Order of June 8, 1981.]

death remedy was identical to the remedy which would be engrafted upon a § 1983 action in a federal court. For purposes of § 1983 actions in state court, we held that the substantive claims "merged," and we affirmed the trial court's dismissal of the § 1983 claim.[8]

The present case may be distinguished from *Jones* in two significant respects: (1) the plaintiffs here have proceeded soley under claims that their federal rights have been violated, and (2) the personal representative of the decedent has here brought an action on behalf of the decedent himself.

Rights of action are to "merge" when a peson takes or acquires a remedy of a higher nature, in

---

[8] When *Jones* was decided, the § 1983 plaintiff was completely barred from recovering from the municipality that employed the police officer defendants. At that time, the state wrongful death action provided the plaintiff a "broader remedy" than would have been permitted here under § 1983. *Id.*, 191 Colo. at 7, n. 7, 550 P.2d at 344. *but see* Note, *Damages in Section 1983 Action Controlled by State Law: Jones v. Hildebrant*, 55 *Den. L. J.* 291 (1978).

Since our decision in *Jones*, the immunity status of municipal defendants has readically altered. *Compare Owen v. City of Independence*, ____ U.S. ____ , 100 S.Ct. 1398, ____ L.Ed.2d ____ (1980) *and Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) *with Moor v. County of Alameda, supra, and Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 492 (1961). *See* Part II of this opinion, *infra*. Furthermore, 42 U.S.C. § 1988 has been amended to provide that, and any action or proceeding to enforce a provision of § 1983, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641 [codified as the second sentence of 42 U.S.C. § 1988 (1976)]. This provision of § 1988 has been applied to § 1983 claims brought in state court as well as those pursued in federal court. *Main v. Thiboutot, supra*, n. 2. *See Thorpe v. Durango School District, supra*, n. 2.

Joint Appendix

Office - Supreme Court, U.S.
FILED
JAN 30 1982
ALEXANDER L. STEVAS
CLERK

No. 81-534

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN O'DELL, GARY GRAHAM and DAVID NEIL, ARTHUR DILL, Chief of Police of the City of Denver, and the CITY AND COUNTY OF DENVER,

Petitioners,

vs.

ANDREW ESPINOZA, individually and as Personal Representative of the Estate of Arthur Espinoza, deceased, and as guardian of JEANNE ESPINOZA, JR., BARRY ESPINOZA, and BEVERLY ESPINOZA, heirs-at-law of the deceased, and the ESTATE OF ARTHUR ESPINOZA, deceased,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF COLORADO

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1981.
CERTIORARI GRANTED DECEMBER 14, 1981.

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The Opinion of the Colorado Supreme Court and the Order modifying the Opinion are found in the Appendix included in the Petition for Writ of Certiorari to the Supreme Court of the State of Colorado. The Opinion is reported at 633 P.2d 455 (1981).

Relevant Docket Entries

March 13, 1978 — First Amended Complaint filed in Denver District Court.

November 29, 1978 — Order of Denver District Court, Honorable Clifton A. Flowers (presiding) dismissing the First Amended Complaint.

January 29, 1979 — Colorado Supreme Court grants Petition for Certiorari to Colorado Court of Appeals before judgment entered in Court of Appeals.

May 4, 1981 — Colorado Supreme Court enters its judgment.

June 8, 1981 — Colorado Supreme Court enters order modifying opinion, and as modified, denies Petition for Rehearing.

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO

Civil Action No. C-75784

[Caption Omitted]

FIRST AMENDED COMPLAINT

FIRST CLAIM FOR RELIEF

1. That at all times pertinent hereto, Andrew Espinoza, Arthur Espinoza, Jr., Barry Espinoza, Beverly Espinoza, Jeanne Espinoza, and Judith Espinoza, were the children and sole heirs at law of the decedent, Arthur Espinoza.

2. That at all times pertinent hereto, Andrew Espinoza was and is the Personal Representative of the Estate of Arthur Espinoza, and is the dutifully and legally appointed guardian of Plantiffs, Jeanne Espinoza and Judith Espinoza, who are minors.

3. That the decedent, Arthur Espinoza, was not married at the time of his death.

4. That at all times pertinent hereto, the Defendants, O'Dell, Graham, and Neil, were acting within the scope of their employment, acting under color of the authority of state law, and were employees and active members of the Denver Police Department.

5. That at all times pertinent hereto, Arthur Dill was the Chief of Police of the Denver Police Department.

6. That at all times pertinent hereto, the Defendant, City and County of Denver, was and is a municipal corporation.

7. That on or about July 30, 1977, at or near 31st and Curtis Streets, in Curtis Park, located in Denver, Colorado, the Defendants, O'Dell, Graham, and Neil, wrongfully shot and killed the decedent, Arthur Espinoza, while he was lying on the ground unarmed, and that such actions were undertaken willfully, maliciously, wantonly, recklessly, and with a willful and wanton disregard for the rights and feelings of the decedent, Arthur Espinoza, and his heirs at law, the Plaintiffs herein.

8. That at all times pertinent hereto, the decedent, Arthur Espinoza, was a citizen of the United States of America, and of full legal age.

9. That at all times pertinent hereto, the Plaintiffs were and are citizens of the United States of America.

10. That at all times pertinent hereto, the Defendants, O'Dell, Graham, and Neil, all acting under color of law, intentionally deprived the decedent, Arthur Espinoza, decedent's estate, and the decedent's heirs at law, the Plaintiffs herein, of Plaintiffs' rights, privileges and immunities secured by the Constitution of the United States of America, including one or more of the following specific rights and freedoms as guaranteed by the Constitution of the United States of America and 42 U.S.C. §1983.

(a) His right to life;

(b) His children's right to their father's continued life.

(c) His right to freedom from physical abuse and death;

(d) His children's right to have their father be free from physical abuse and death;

(e) His right to equal protection of the law;

(f) His children's right to have their father be accorded equal protection of the law;

(g) His right to freedom of association;

(h) His children's right to have their father freely associate;

(i) His right not to be denied due process of law;

(j) His children's right to have their father not be denied due process.

11. The Defendants, O'Dell, Graham, and Neil, having engaged in the illegal conduct herein mentioned to the injury of Arthur Espinoza, deprived the decedent, Arthur Espinoza, and the Plaintiffs

herein, of their rights, privileges, and immunities as secured by the First, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments to the Constitution of the United States of America, and by the Constitution of the State of Colorado, and by 42 U.S.C. §1983.

12. As a direct and proximate consequence of the Defendants' actions, the Plaintiffs have suffered damages in the amount of Two Million Dollars ($2,000,000).

WHEREFORE, Plaintiffs pray for general damages in the amount of Two Million Dollars ($2,000,000), special damages, funeral and burial expenses, all of which have not been fully accounted for, and Plaintiffs pray leave of the Court to enter the exact amount when known prior to trial, expert witness fees, and costs, interest from the time of filing of this Complaint, and for such other and further relief as this Court may deem just and proper.

SECOND CLAIM FOR RELIEF

1. Plaintiffs incorporate by reference paragraphs 1 through 9 of their First Claim for Relief as if fully set forth herein.

2. At all times pertinent hereto, the Defendants, O'Dell, Graham, Neil, and Dill, while acting under color of law and servants and employees of Defendant, City and County of Denver, conspired to intentionally deprive the decedent, Arthur Espinoza, the decedent's estate, and his heirs at law, the Plaintiffs herein, of his and their rights to equal protection of the laws and to equal privileges and immunities under the law and his and their rights, security, and liberties secured by the Constitution of the United States, including, but not limited to:

(a) His right to life;

(b) His children's right to their father's continued life;

(c) His right to freedom from physical abuse and death;

(d) His children's right to have their father be free from physical abuse and death;

(e) His right to equal protection of the law;

(f) His children's right to have their father be accorded equal protection of the law;

(g) His right to freedom of association;

(h) His children's right to have their father freely associate;

(i) His right not to be denied due process of law;

(j) His children's right to have their father not to be denied due process.

3. The Defendant's, O'Dell, Graham, Neil, and Dill, having conspired to engage in the illegal conduct herein mentioned to the injury of the decedent, Arthur Espinoza, and his heirs at law, the Plaintiffs herein, deprived Arthur Espinoza and the Plaintiffs herein of their rights, privileges, and immunities secured to them by the First, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments to the Constitution of the United States of America, by the Constitution of the State of Colorado, and by 42 U.S.C. §1985.

4. That as a direct and proximate consequence of the Defendant's actions, the Plaintiffs have suffered damages in the amount of Two Million Dollars ($2,000,000).

WHEREFORE, Plaintiffs pray for general damages in the amount of Two Million Dollars ($2,000,000), special damages, funeral and burial expenses, all of which have not been fully accounted for, and Plaintiffs pray leave of the Court to enter the exact amount when known prior to trial, expert witness fees, and costs, interest from the time of filing of this Complaint, and for such other and further relief as this Court may deem just and proper.

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IN THE DISTRICT COURT
IN AND FOR THE CITY AND COUNTY OF DENVER
STATE OF COLORADO
Civil Action No. C-75784

ORDER

[Caption Omitted]

THIS MATTER is before the Court for consideration of the Motions to Dismiss filed by all of the Defendants and directed to the First Amended Complaint filed by the Plaintiffs herein. The Court has read and considered the memorandum briefs in support of and in opposition to the Motions to Dismiss and now believes itself to be fully advised.

The Amended Complaint alleges that on or about July 30, 1977, in Curtis Park in Denver, Colorado, one Arthur Espinoza was wrongfully shot and killed by the Defendants, John O'Dell, Gary Graham and David Neil, who were then and there acting in their capacities as police officers for the Defendant, The City and County of Denver. The Amended Complaint further alleges that at all times pertinent hereto the Defendant, Arthur Dill, was the Chief of Police of the Denver Police Department. It is further alleged that Arthur Espinoza was unmarried at the time of his death on July 30, 1977. The Amended Complaint is brought by the Estate of Arthur Espinoza, Deceased, by the personal representative of his estate, and by his five children who are the sole heirs at law of the decedent, two of whom are minors and appear by their Guardian.

The Amended Complaint sets forth two claims for relief based upon the alleged violation of the civil rights of the Plaintiffs herein and of the Plaintiffs' decedent, Arthur Espinoza. The first claim is premised on 42 U.S.C., Sec. 1983, and the second claim is premised on 42 U.S.C., Sec. 1985. In their Motions to Dismiss, the Defendants assert that the Amended Complaint fails to state claims upon which relief can be granted. The question for determination is whether, under the facts presented, the Defendants are amenable to suit under 42 U.S.C., Secs. 1983 and 1985, or whether Plaintiffs sole remedy is a wrongful death action pursuant to 13-21-202, C.R.S. 1973. The case of *Jones v. Hildebrant*, ____ Colo. ____, 550 P.2d 339 (1976), *cert. dismissed*, 97 S.Ct. 2283 (1977), is virtually on all fours with the case at bar and is, in the opinion of the Court, controlling.

In *Jones* the plaintiff sued a Denver police officer and the City and County of Denver as a result of the death of her fifteen-year old son. The plaintiff there alleged that the officer, while acting in his capacity as a Denver police officer, had wrongfully shot and killed her son. The City and County of Denver was joined as a defendant because of its alleged vicarious liability as a principal. The plaintiff in *Jones* asserted two claims for relief based upon the Colorado wrongful death statute, section 13-21-202 C.R.S. 1973, and a third claim based on 42 U.S.C., Sec. 1983. In dismissing the Sec. 1983 claim, the trial court ruled that this claim merged with plaintiff's other claims under the Colorado wrongful death statute; additionally the trial court limited plaintiff's recovery to a maximum of $45,000.00 (pursuant to 13-21-203, C.R.S. 1973) because she was not a dependent of the deceased. The *Jones* Court recognized that the civil rights legislation in question "* * *was designed to protect citizens not only from violence which would cripple but also from violence that would kill" and acknowledged that Sec. 1988 of 42 U.S.C. permits the incorporation of Colorado's wrongful death statute into a Sec. 1983 federal court action in order to effectually implement the policies of that legislation. The Court in *Jones* concluded, however, that although Colorado's wrongful death remedy would be engrafted into a Sec. 1983 action if brought in a federal court, since plaintiff's claim was brought in a state court and joined with a claim under the state wrongful death statute, the two claims were thereby merged and the Sec. 1983 claim was therefore properly dismissed. The Court in *Jones* further held that a federal wrongful death remedy does not exist under Sec. 1983 independent of state wrongful death remedies. The Court based this holding on the * * *perceived Congressional intent not to pre-empt the states' carefully wrought wrongful death remedies, the adequacy in a death case of the state remedies to vindicate a civil rights violation, and the overwhelming acceptance of such remedies in the federal courts." The Court thereupon affirmed the judgment of the trial court, holding that, * * *The interests protected by Sec. 1983 are adequately vindicated when actions are brought by the injured parties themselves, or at their death, by those designated in our wrongful death statute." The holding of the Court in *Jones* with respect to a Sec. 1983 civil rights claim would apply equally to a Sec. 1985 claim, which relates to conspiracies to deprive others of their civil rights, as asserted by Plaintiffs in their second claim for relief.

The recent U.S. Supreme Court case of *Robertson v. Wegmann*, ____ U.S. ____, 98 S.Ct. 1991 (1978), holds that where a state law generally is not "inhospitable" to a Sec. 1983 action and where the particular application of that state law has no independent adverse effect on the policies underlying Sec. 1983, e.g., compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law, the state law is not "inconsistent" with federal law and will be applied in a federal court Sec. 1983 action. The Colorado wrongful death statute in general cannot be said to be "inhospitable" to Sec. 1983; nor can it be said that the Colorado wrongful death statute, as applied in the instant case, will have an independent adverse effect on the policies underlying Sec. 1983. It would appear therefore that if the instant action had been brought in the federal court the Plaintiffs' remedies would be limited to those provided by our wrongful death statute on behalf of the heirs of Arthur Espinoza. Since the action has been brought in a state court the remedies are likewise those provided by the Colorado wrongful death statute and the only proper parties-plaintiffs are the heirs of Arthur Espinoza.

Plaintiffs in the case at bar also assert that they have been deprived of their own constitutional rights under Secs. 1983 and 1985. But as the Court in *Jones* indicated, these deprivations are really those of the Plaintiffs' decedent, and the Plaintiffs herein who are the children of the decendent are precluded, as was the mother of the decedent in *Jones*, from suing in their own right for the deprivation of their father's rights apart from their remedy under the Colorado wrongful death statute. By the same reasoning, neither can a cause of action be maintained for the deprivation of the civil rights of the decedent by the decedent's estate or his personal representative.

It follows that a cause of action under Sec. 1983 alone cannot be maintained in a state court for the wrongful death of the decedent, Arthur Espinoza. Plaintiffs' claims are in reality grounded upon the wrongful death of Arthur Espinoza and must be brought by his heirs pursuant to the Colorado wrongful death statute. The Court is of the opinion that the Colorado wrongful death statute fully and adequately provides for the vindication of the death of a person when that death has been caused by the wrongful act of another. This is true even where, as here, the wrongful act is alleged to have been attended by a violation of the deceased's civil rights. There is no logical reason why the remedies available to the heirs of persons who have been deprived of their lives by the wrongful acts of others should differ depending upon whether or not the death was attended by circumstances constituting a violation of the deceased's civil rights.

With respect to the Defendant, Arthur Dill, in his capacity as Chief of Police of the City of Denver, the law is settled that he is not vicariously liable under the doctrine of respondeat superior for the acts of his subordinates in allegedly violating the civil rights of the decedent. *Kite v. Kelly*, 546 F.2d 334 (10th Cir. 1976); *Rizzo v. Goode*, 423 U.S. 362 (1976). As for the Defendant, The City and County of Denver, a municipality is not a "person" under the federal civil rights legislation and is therefore not amenable to suit under Secs. 1983 and 1985 of 42 U.S.C. *Moore v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973); *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). See, also, Note 7, page 344, in *Jones v. Hildebrant*, supra.

The Court concludes, therefore, that the sole remedy available in the state courts to vindicate the death of Arthur Espinoza is a wrongful death action by his heirs pursuant to 13-21-202, C.R.S. 1973. Since the claims asserted under Secs. 1983 and 1985 do not state claims for relief standing alone and since no claim under the state wrongful death statute is made, the First Amended Complaint fails to state a claim against the Defendants upon which relief can be granted.

Accordingly, it is ORDERED that the Motions filed by the Defendants to Dismiss the First Amended Complaint are granted, and Plaintiffs' First Amended Complaint is hereby dismissed.

It is further ORDERED that those Plaintiffs who are the heirs of the decedent, Arthur Espinoza, shall have twenty (20) days from the date hereof within which to file a Second Amended Complaint against the Defendants, John O'Dell, Gary Graham, David Neil, and The City and County of Denver, pursuant to the Colorado wrongful death statute, if they so desire.

It is further ORDERED that in the event of a Second Amended Complaint is not filed in accordance with the above Order, then Defendants may move the Court for the entry of a judgment of dismissal as to the First Amended Complaint.

DONE this 29th day of November, 1978.

BY THE COURT:

CLIFTON A. FLOWERS
District Judge

Opposition

QUESTIONS PRESENTED FOR REVIEW

1. Whether existence of an ineffective and inconsistent state wrongful death remedy precludes a proper 42 U.S.C. § 1983 claim.

2. Whether a claim under 42 U.S.C. § 1983 exists for the personal rights of surviving children of the decedent whose life was wrongfully taken by state action.

3. Whether Colorado's wrongful death statute, if applied as it has in the past, restricts recovery in these situations to such a degree as to be inconsistent with the federal remedy contained in the Civil Rights Statutes.

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1871 Civil Rights Act 2

OPINION BELOW

The opinion of the Colorado Supreme Court and its order modifying such opinion were set forth in the petition for writ of certiorari of the Petitioners.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

These grounds are set forth in the petition for writ of certiorari of the Petitioners.

CONSTITUTIONAL PROVISION AND STATUTES

These Constitutional provisions and statutes are set forth in the petition for writ of certiorari.

STATEMENT OF THE CASE

Respondents concur in the Petitioners' statement of the case.

ARGUMENT

This Honorable Court has been asked to review the 1981 opinion of the Colorado Supreme Court in Espinoza, et al. v. O'Dell, et al., a copy of which opinion was attached to the petition for certiorari. Basically, Espinoza, et al. v. O'Dell, et al. arises out of the confusion which existed both prior and subsequent to this Honorable Court's decision dismissing certiorari in Jones v. Hildebrant, 432 U.S. 183, 97 S.Ct. 2282, 53 L.Ed.2d 209 (1977). The issues raised herein go to the heart of effective enforcement of the Civil Rights Statutes enacted after the Civil War to ensure civil rights to all citizens and persons living in the United States. At issue is the question of the relationship between state wrongful death statutes and federal civil rights remedies, and the effect to which the former can be lawful when they are inconsistent and restrict the latter.

Following the dismissal of certiorari in Jones v. Hildebrant, the Colorado lower courts, and indeed most other state courts and lower federal courts, basically followed the position that state wrongful death statutes governed the Civil Rights Statutes, regardless of inconsistency. Although this position did not appear supportable under the clear authority of Robertson v. Wegmann, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978), nevertheless, these lower courts restricted recovery possible in civil rights actions involving death. Consistent with this pattern, the Colorado trial court in this case dismissed the complaint on the grounds that only a Colorado wrongful death complaint could lie, and that no federal action was proper, having "merged" into the state wrongful death claim. See Jones v. Hildebrant, supra.

Although the uneasy relationship between federal and state law in this area was somewhat delineated in Robertson v. Wegmann, supra, the interstices of civil right recovery, when death occurs, remain to be established. As a consequence, lower federal and state courts are wholly without guidance in the area of death recovery under the civil rights acts where such actions were purportedly limited by state wrongful death and survivorship statutes which affect the character of proper party plaintiffs, the maximum allowable recovery, and the type of pecuniary damages recoverable, such as those restricting recovery to "net pecuniary loss". See, e.g., § 13-20-101, C.R.S. 1973.

The initial question is whether 42 U.S.C. § 1983 was designed to include actions when death occurs. There can be no question that the congressional intent in passing the 1871 Civil Rights Act was to provide remedies in death cases, as well as in situations involving non-fatal injury. The congressional purpose for passage of these acts was to provide a "positive punitive civil remedy" rather than compensation for specific physical or financial injury. Niles, Civil Actions for Damages under the Federal Civil Rights Statutes, 45 Tex. L.Rev. 1015, 1026 (1967). Such modern extrapolation of congressional intent is borne out by reference to the legislative history.

For example, President Grant's message to Congress refers specifically to losses of life which prompted his request for remedial federal legislation. *Cong. Globe*, 42d Cong., 1st Sess., p. 244. Floor debates on the bill frequently reflected that theme. Senator Lowe of Kansas states:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local adminstrations have been found inadequate or unwilling to apply the proper correction. (*Cong. Globe*, 42d. Cong., 1st Sess., p. 374).

Similarly, Congressman Butler, in trying to convince his colleagues that municipalities should be liable under the civil rights acts, stated that:

> This then is what we offer to a man whose house has been burned, as a remedy; to the woman whose husband has been murdered, as a remedy; *to the children whose father has been killed as a remedy*. (Cong. Globe, 42d Cong., 1st Sess., p. 807). (Emphasis supplied). *See also Cong. Globe*, 42d Cong., 1st Sess., p. 321 (protection for life); *Cong. Globe*, 42d Cong., 1st Sess., P. 370 (Act passed in hopes of achieving a civilization "in which every man's house is defended against murder and arson. . ."); *Cong. Globe*, 42d Cong., 1st Sess., p. 428; *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

It is not surprising, therefore, that the courts have uniformly held that Congress intended the civil rights acts to apply where the deprivation of constitutional right resulted in death. *See*, *e.g.*, *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961), *cert. denied*, 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed.2d 136; *Hall v. Wooten*, 506 F.2d 564 (6th Cir. 1974); *Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977); *Perkins v. Salafia*, 338 F.Supp. 1325 (D.Conn. 1972). *See also Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 n. 14 (1973).

> [I]t defies history to conclude that Congress purposely meant to assure to the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil rights statutes against the peril of death. The policy of the law and the legislative aim was certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which would cripple. Braizer v. Cherry, supra. See also Green v. Carlson, 581 F.2d 669 (7th Cir. 1978).

Without question, therefore, § 1983 actions, and § 1985 actions as well, are properly brought even when the constitutional deprivation results in the death of the principal victim of violence. As was stated in Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946):

> [W]here federally protected rights have been involved, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to right the wrong done.

See also Green v. Carlson, supra; Basista v. Weir, 340 F.2d 75 (3d Cir. 1965); Salazar v. Dowd, 256 F.Supp. 220 (D.Colo. 1966).

Thus,

> Where existing law imposes a primary duty violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). See also Sea-Land Services v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 29 L.Ed.2d 9 (1974).

The next question, therefore, is whether the Colorado wrongful death and survival statute is inconsistent with the federal policies sought to be advanced by the Civil Rights Statutes of 1871. Since the express purpose of 42 U.S.C. § 1988 is to make available that redress which will effectuate the broad policies of the Civil Rights Statutes, see Braizer v. Cherry, supra; Smith v. Wickline, 396 F.Supp. 555 (W.D. Okla. 1975), the statements of this Honorable Court in

Sullivan v. Little Hunting Park, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969), are even more appropriate here:

> This means, as we read § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statute. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need wherever a federal right is impaired. (Emphasis supplied).

The question faced by the Colorado Supreme Court in this case was the extent to which Colorado's wrongful death statute, which restricts recovery to $45,000, requires proof of "net pecuniary loss", and precludes recovery of exemplary damages, serves the policies of the Civil Rights Statutes, or instead, is inconsistent with such policies. The damages ceiling restricts individual liability, especially read in conjunction with § 29-5-111, C.R.S. 1973, the Colorado "indemnification" statute, which ensures that any damages recovered by an employee of a municipality will be paid by that municipality, rather than the individual. A preclusion of exemplary damages similarly guarantees that the individual civil rights violators will not be liable. Finally, restricting loss to "net pecuniary worth" does not serve the policy of preventing of official illegality resulting in death, since the real loss is that of a human life, not of dollars and cents.

In this regard, the Colorado Supreme Court has set forth a long and complicated decision in this case, attempting to fill in the gaps existing between federal and state law in this area. Unfortunately, they were without much guidance in this regard other than the decision in Robertson v. Wegmann, supra, and the dismissal of certiorari in Jones v. Hildebrant, supra. Respondents submit that, although they agree in most regards with the decision of the Colorado Supreme Court in this case, the existing state of confusion cries out for granting of the writ of certiorari in this case, so that this

Honorable Court can determine the very important issues of federal law raised by this case, which it has in common with countless other civil rights actions filed all over the United States in police brutality and similar actions filed by the survivors of persons killed by state and municipal authorities. For this reason, Respondents also pray that the petition for writ of certiorari be granted, so that their case, and the countless others throughout the nation of similar ilk, can proceed under clear federal authority to judgment and verdict, without the fear of later appellate modification because of a particular state court's misapprehension of this Honorable Court's interpretation of this vital aspect of federal law.

Respectfully submitted,

GERASH & ROBINSON, P.C.

By ____________________
Scott H. Robinson
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Certificate of Mailing

I hereby certify that on this 9th day of November, 1981, I mailed a copy of the above memorandum brief in support of waiver of right to file response to Petitioner - need for supreme court determination to Theodore S. Halaby, 5945 W. Mississippi Avenue, Denver, Colorado 80226; Louis B. Bruno, Suite 680, Lake Plaza South, 44 Union Boulevard, Lakewood, Colorado 80226; and Leonard M. Chesler, 1343 Delaware Street, Denver, Colorado 80204.

Rebecca Hudson

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

JOHN O'DELL, GARY GRAHAM,
DAVID NEIL, ARTHUR DILL,
Chief of Police of the City
and County of Denver, and the
CITY AND COUNTY OF DENVER,

Petitioners,

vs.

ANDREW ESPINOZA, individually
and as Personal Representative
of the Estate of Arthur
Espinoza, deceased, and as
guradian of JEANNE ESPINOZA
and JUDITH ESPINOZA, minors;
ARTHUR ESPINOZA, JR., BARRY
ESPINOZA, and BEVERLY ESPINOZA,
heirs-at-law of the deceased,
and the ESTATE OF ARTHUR
ESPINOZA, deceased,

Respondents.

No. 81-534

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 53(1) of the Rules of this Court, the Petitioners, Andrew Esqpinoza, et al., herein ask leave to file their petition for writ of certiorari to the Supreme Court of Colorado without prepayment of costs and to proceed in forma pauperis. The Petitioners attach their affidavit in support of this motion hereto.

Respectfully submitted,

GERASH & ROBINSON, P.C.

By
Scott H. Robinson
Attorneys for Respondents
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Denver, Colorado 80202
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JOHN O'DELL, GARY GRAHAM, DAVID NEIL, ARTHUR DILL, Cheif of Police of the City and County of Denver, and the CITY AND COUNTY OF DENVER,

Petitioners,

vs.

ANDREW ESPINOZA, individually and as Personal Representative of the Estate of Arthur Espinoza, deceased, and as guardian of JEANNE ESPINOZA and JUDITH ESPINOZA, minors; ARTHUR ESPINOZA, JR., BARRY ESPINOZA, and BEVERLY ESPINOZA, heirs-at-law of the deceased, and the ESTATE OF ARTHUR ESPINOZA, deceased,

Respondents.

No. 81-534

AFFIDAVIT

I, Andrew Espinoza, being first duly sworn according to law, depose and say, in support of Respondents' motion for leave to proceed without being required to prepay costs or fees:

1. I am a Respondent in the above-entitled case and am the Personal Representative of the Estate of Arthur Espinoza, deceased, and am the guardian to Jeanne Espinoza and Judith Espinoza, minors; Arthur Espinoza, Jr., Barry Espinoza and Beverly Espinoza, heirs-at-law of the deceased.

2. Because of our poverty, Respondents are unable to pay the costs of said cause.

3. We are unable to give security for the same.

4. I believe that Respondents are entitled to the redress they seek in said case.

5. The nature of said cause is breifly stated as follows: In November, 1977, Respondents filed a complaint in the District Court for the Second Judicial District,

State of Colorado, against the above-named Petitioners, alleging the deprivation of the decedent, Arthur Espinoza, and the Respondents herein of their rights, privileges, and immunities as secured by the First, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments to the Constitution of the United States of America and by the Constitution of the State of Colorado, and by 42 U.S.C. §§ 1983 and 1985 arising out of the intentional shooting and killing of the deceased, Arthur Espinoza. The defendants filed a motion to dismiss and the trial court granted said motion, ruling that no proper claim for relief was alleged inasmuch as relief was sought premised solely on federal civil rights statutes, without reference to or claim made under the Colorado Wrongful Death Statute, § 13-21-202, C.R.S. 1973. The Supreme Court of the State of Colorado reversed the trial court's dismissal holding that Respondents do have claims under their § 1983 action.

Andrew L Espinoza
Andrew Espinoza

STATE OF COLORADO)
) ss.
County of)

The foregoing affidavit was sworn to and subscribed before me this 9th day of November, 1981, by Andrew Espinoza.

My Commission expires June 15, 1985

Notary Public
1439 Court Place
Denver Colo 80202

Petitioner's Brief

No. 81-534

Office - Supreme Court, U.S.
FILED
JAN 30 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN O'DELL, GARY GRAHAM and DAVID NEIL, ARTHUR DILL, Chief of Police of the City of Denver, and the CITY AND COUNTY OF DENVER,

Petitioners,

vs.

ANDREW ESPINOZA, individually and as Personal Representative of the Estate of Arthur Espinoza, deceased, and as guardian of JEANNE ESPINOZA, JR., BARRY ESPINOZA, and BEVERLY ESPINOZA, heirs-at-law of the deceased, and the ESTATE OF ARTHUR ESPINOZA, deceased,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF THE PETITIONERS

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Questions Presented for Review

1. Whether a child may assert a claim pursuant to 42 U.S.C. § 1983 premised on a right personal to the child consisting of a constitutional liberty interest in the continuation of such child's family relationship with his parents?

2. Assuming *arguendo* that such a § 1983 claim exists, what damages are recoverable pursuant to the child's § 1983 claim where such claim is based on the wrongful taking of the life of the child's parent?

3. Whether the existence of a state wrongful death remedy precludes a § 1983 claim premised on the wrongful taking of a life?

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Opinion Below

The opinion of the Colorado Supreme Court and its order modifying such opinion are set forth in the Appendix of the Petition. The Opinion is reported at 633 P.2d 455 (1981).

Grounds on Which the Jurisdiction of this Court is Invoked

The Colordo Supreme Court entered its judgment on May 4, 1981. On May 27, 1981, the Colorado Supreme Court entered an Order extending the time to June 1, 1981, within which to file a Petition for Rehearing. On June 8, 1981, the Colorado Supreme Court entered an order modifying its opinion, and as modified, denied the Petition for Rehearing. 28 U.S.C. § 1257 (3) is the statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari.

Constitutional Provision and Statutes

U.S. Constitution Amendment XIV, which provides:

> "SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

42 U.S.C. § 1983:

> "Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

C.R.S. 1973 § 13-21-201:

> Damages for death. (1) When any person dies from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant or employee while running, conducting, or managing any locomotive, car, or trains of cars, or of any driver of any coach or other conveyance operated for the purpose of carrying either freight or passengers for hire while in charge of the same as a driver, and when any passenger dies from an injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or other conveyance operated for the purpose of carrying either freight or passengers for hire, the corporation or individuals in whose employ any such officer, agent, servant, employee, master, pilot, engineer, or driver is at the time such injury is committed, or who owns any such railroad, locomotive, car, or other conveyance operated for the purpose of carrying either freight or passengers for hire at the time any such injury is received, and resulting from or occasioned by the defect or insufficiency above described shall forfeit and pay for every person and passenger so injured the sum not exceeding ten thousand dollars and not less than three thousand dollars, which may be sued for and recovered:
>
> a) By the husband or wife of deceased; or
>
> b) If there is no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of the deceased, or
>
> c) If the deceased is a minor or unmarried, then by the father or mother who may join in the suit, and each shall have an equal interest in the judgment; or if either of them is dead, then by the survivor.
>
> (2) In suits instituted under this section, it is competent for the defendant for his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency. If the action under this section is brought by the husband or wife of the deceased, the judgment obtained in said action shall be owned by such persons as are heirs at law of the deceased under the statutes of descent and distribution, and shall be divided among such heirs at law in the same manner as real estate is divided according to said statute of descent and distribution."

C.R.S. 1973 § 13-21-202:

> "Action notwithstanding death. When the death of a person is caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured."

C.R.S 1973 § 13-21-203:

> "Limitation on damages. (1) all damages accruing under section 13-21-202 shall be sued for and recovered by the same parties and in the same manner as provided in section 13-21-201, and in every such action the jury may give such damages as they deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue; and also parties who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect, or default; except that if the decedent left neither a widow, widower, nor minor children, nor a dependent father or mother, the damages recoverable in any such action shall not exceed forty-five thousand dollars. No action shall be brought and no recovery shall be had under both sections 13-21-201 and section 13-21-202 and in all cases the plaintiff is required to elect under which section he will proceed.
> (2) This section shall apply to a cause of action based on a wrongful act, neglect, or default occurring on or after July 1, 1969. A cause of action based on wrongful act, neglect, or default occurring prior to July 1, 1969, shall be governed by the law in force and effect at the time of such wrongful act, neglect, or default.

Statement of the Case

Respondents, as the personal representative of the estate of ARTHUR ESPINOZA and as the children of the decedent, ARTHUR ESPINOZA, filed a First Amended Complaint in the District Court for the City and County of Denver which alleged, *inter alia*, that Petitioners O'DELL, GRAHAM, and NEIL, while acting under the color of their authority as Denver police officers, wrongfully shot and killed the father of the Respondent children. ARTHUR ESPINOZA, in Denver on July 30, 1977; that such act was done willfully, maliciously, and with wanton disregard for the rights and feelings of the decedent and his children; that such actions on the part of said police officers deprived the decedent and his children of his rights and their rights, privileges, and immunities as secured by the First, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution, the Constitution of the State of Colorado, and 42 U.S.C. 1983, for which they were entitled to general and exemplary damages. Petitioners moved to dismiss the Complaint, claiming, *inter alia*, that a federal wrongful death remedy did not exist pursuant to 42 U.S.C. § 1983 independent of the Colorado wrongful death remedy and that the Respondents had sought no state wrongful death remedy. The trial court in reliance on *Jones v. Hildebrant*, 191 Colo. 1, 550 P.2d 339 (1976), *cert. dismissed*, 432 U.S. 183, (1977), granted Petitioners motion and dismissed the Respondent children's § 1983 claim. The trial court held that a federal wrongful death remedy does not exist under 42 U.S.C § 1983 independent of any state wrongful death remedies, and that the Colorado Wrongful Death Statute, C.R.S. 1973 § 13-21-202 is not inhospitable to the underlying policies of these federal causes of action; that because Respondents made no claims pursuant to available state death remedies, the First Amended Complaint failed to state a claim upon which relief could be granted. Respondents appealed to the Colorado Court of Appeals, however, the Colorado Supreme Court granted *certiorari* to the Court of Appeals before judgment was entered in said court. Thereafter, the Colorado Supreme Court, *inter alia*, reversed the trial court's dismissal of the Respondent children's § 1983 action, and remanded the case to the trial court, with instructions, *inter alia*, to reinstate the children's § 1983 claims. This direction was based on a finding that the children possessed a § 1983 claim personal to them based on the alleged deprivation of their personal constitutional liberty interest in the continuation of their family relationship with their deceased father.

Summary of Argument

The Colorado Supreme Court erroneously reversed the trial court's dismissal of the Respondent children's § 1983 claims. This error arose from the court's unprecedented finding that a child possesses a broad substantive due process interest premised on the child's own constitutional liberty interest in the continuation of his family relationship with his father; that deprivation of such right may be vindicated pursuant to § 1983. However, such a constitutional liberty interest in the child does not exist because it is not fundamental or implicit in the concept of ordered liberty, thereby warranting constitutional protection. Even assuming that an absolute constitutional liberty interest exists in the parent with respect to his relationship with his child, the existence of such a right does not justify recognition of a similar reciprocal right in the child to a continuing relationship with his parent. Recognition of such a constitutional liberty interest in the child would subject the court to limitless § 1983 claims for even the slightest wrongful state interference in the family relationship.

Where the state has wrongfully caused the death of a parent, a surviving child cannot sue under § 1983 for deprivation of the civil rights of the deceased parent. The child has only that cause of action granted to it by the state for the wrongful death of the parent; and any recovery pursuant to such claim is limited by the provisions of the state statute granting the right. The fact that the state remedy provided under such circumstances would limit the child's claim to that of a property tort with damages confined to "net pecuniary loss," does not violate due process nor justify creation of a constitutional interest in the child that does not exist, simply to avoid the damage limitation.

Argument

I.

A Constitutional Liberty Interest in the Child to the Continuation of the Child's Family Relationship Does Not Exist

The gravamen of the Colorado Supreme Court's holding is that there exists in a child a broad substantive due process interest premised on a constitutional liberty interest in the continuation of that child's family relationship that may be vindicated pursuant to 42 U.S.C. § 1983. It should be noted that no other court has previously recognized such a constitutional liberty interest in a child. It should be further noted that in reaching its finding, the Colorado Supreme Court did not make the *death* of the parent a prerequisite for finding deprivation of such right; i.e., the deprivation did not need to be "permanent."

The Colorado Supreme Court premised its finding upon what it erroneously perceived to be this Court's recognition in *Stanley v. Illinois,* 405 U.S. 645 (1972), of a parent's constitutional liberty interest in the relationship with the child that would afford a parent a § 1983 claim based on wrongful state interference with such relationship. *Espinoza v. O'Dell*, Colo., 633 P.2d 455, 463 (1981). The reasoning of the Colorado Supreme Court was as follows:

> [T]he due process clause of U.S. Const. amend. XIV, extends constitutional protections to the relationship between parent and child. *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). *See Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). *The parent's liberty interest in the 'companionship, care, custody, and management of his or her children'* [*Stanley v. Illinois, supra*, 405 U.S. at 651, 92 S. Ct. at 1212], *under most circumstances, runs parallel to the child's interest in a continued relationship and association with its parent, upon whom the child is dependent for custody, care, and nurture. See Wisconsin v. Yoder, supra; Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944). Cf. *Sanchez v. Marquez*, 457 F. Supp. 359 (D. Colo. 1978) (a sibling relationship does not support a § 1983 cause of action). (emphasis added.) *Ibid*.

However, this Court has never addressed this issue. *See Jones v. Hildebrant*, 432 U.S. 183, 189 (1977) (White, J., dissenting). An analysis of *Stanley* makes clear that the Colorado Supreme Court's reliance on that case to justify its unprecedented finding was misplaced.

In *Stanley* an unwed father challenged the Illinois statute that provided that a child of unwed parents would become a ward of the state upon the death of the mother. This Court found that Stanley's liberty interests were sufficient to entitle him as a matter of due process to a hearing on *his* fitness, before the state could take his children from him. Thus, the issue before this Court was not whether there existed in the father a fundamental constitutional liberty interest in a father's continuing relationship with his child, but rather whether the "method of procedure by presumption could be allowed to stand in light of the fact that Illinois law allows married fathers — whether divorced, widowed, or separated — and mothers — even if unwed — the benefit of the presumption that they are fit to raise their children." *Stanley v. Illinois, supra*, at 647. Clearly, procedural due process (and not substantive constitutional liberty interests) was at issue where rights were granted both to married fathers, and to mothers who were either divorced, widowed, separated, or unwed; but were denied to unwed fathers. This Court concluded that all parents were constitutionally entitled to a hearing on their fitness before their children were removed from their custody, and that the denial of a hearing to Stanley while granting it to other parents contravened the Equal Protection Clause.

In *Quilloin v. Walcott, supra*, this Court reexamined its decision in *Stanley* in addressing the constitutionality of Georgia's adoption laws as applied to deny an unwed father authority to prevent adoption of his illegitimate child. In reaching its conclusion that the father was denied neither due process nor equal protection, this Court interpreted *Stanley* as having been resolved on the basis of balancing on the one hand the father's interest in the companionship, care, custody, and management of his children with, on the other, that of the State's interest in caring for the children, resolving this balancing test in favor of the father — an implicit recognition that a fundamental and absolute constitutional liberty interest in the relationship between the father and son does not exist. 434 U.S. at 248. The Court recognized that *Stanley* "left unresolved the degree of protection a State must afford to the rights of an unwed father in a situation, such as that presented here, in which the countervailing interests are more substantial." *Ibid*. Plainly, the Colorado Supreme Court's reliance on *Stanley* was unjustified.

This Court in *Quilloin* did cite prior decisions by it that recognized certain aspects of the relationship between parent and child to be constitutionally protected under certain circumstances. For example, in *Wisconsin v. Yoder, supra*, the Court was faced with deciding the constitutionality of Wisconsin law compelling Amish parents to cause their children to attend formal high school to age sixteen. The Court found that the First and Fourteenth Amendments prevailed in favor of the parents when balancing the State's interest in universal education with the Free Exercise Clause of the First Amendment.

In *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923), this Court made reference to the right to "establish a home and bring up children" as being part of the liberty guaranteed by the Fourteenth Amendment. However, the Court's dicta was ancillary to its finding that a state law forbidding the teaching of any language other than English prior to completion of the eighth grade invaded the liberty guaranteed by the Fourteenth Amendment and exceeded the power of the state.

In *Prince v. Massachusetts, supra,* this Court reaffirmed that the rights of parenthood are not beyond limitation, and that the state has a wide range of power for limiting parental freedom; while recognizing that the custody, care, and nurture of the child resides first in the parents, whose primary function and freedom included preparation for obligations the state can neither supply nor hinder. 321 U.S. at 166-167.

Thus, it is evident from this Court's prior pronouncements that the relationship of the parent to the child is not afforded absolute constitutional protection. The existence of the broad substantive due process interest in that relationship upon which to predicate a § 1983 claim, which was perceived by the Colorado Supreme Court, is not supported by decisions of this Court. *But see Mattis v. Schnarr*, 502 F.2d 588 (8th Cir. 1974); *Jones v. McElroy*, 429 F. Supp. 848 (E.D. Pa. 1977); cf. *Morrison v. Jones*, 607 F.2d 1269 (9th Cir. 1979); *Drollinger v. Milligan*, 552 F.2d 1220, 1225 (7th Cir. 1977); *Wilkinson v. Ellis*, 484 F. Supp. 1072 (E.D. Pa. 1980). *Mattis* held that a parent has sufficient interest in the life of his child to give the parent standing to challenge the constitutionality of Missouri's justifiable homicide statute upon which a policeman relied in using deadly force against the parent's child during the course of an arrest. No finding of a "constitutional" right in the child's life was necessary for the purpose of standing to assert the constitutional challenge.

Even assuming the validity of the Colorado Supreme Court's premise that the parent's relationship to the child is protected by § 1983, it does not follow, as the Colorado Supreme Court concluded, that the child's reciprocal relationship to the parent is equally protected under § 1983. As stated previously, neither this Court nor any other court has found that a child possessed a constitutional liberty interest in the continuation of the child's family relationship with the parent that would support a claim under § 1983. However, in *Evain v. Conlisk*, 498 F.2d 1403 (7th Cir. 1974), the appellate court affirmed without comment the district court's finding to the contrary, to wit: that no constitutional right existed in a daughter that could be asserted pursuant to § 1983 where her father was allegedly wrongfully killed by police officers. *Evain v. Conlisk,* 364 F. Supp. 1188 (D. Ill. 1973).

In *Evain*, the daughter's § 1983 claim was nearly identical to the Respondents' claims herein, grounded on the contention that in wrongfully causing the death of her father, she was deprived of care, love, association, and financial support of her father, and that such deprivation was sufficient to constitute a protectable right under the Civil Rights Act. The trial court in *Evain* properly recognized that one individual cannot sue for the deprivation of another's civil rights; and correctly distinguished the issue before it from the "survival" type situation where the estate sues for the deprivation of the decedent's rights. The court then found that the plaintiff failed to show deprivation of her own constitutional rights sufficient to maintain a claim under § 1983. The *Evain* court is apparently the only one to have ever addressed this precise issue now before this Court.

In *Jones v. Hildebrant*, 191 Colo. 1, 550 P.2d 339, 345 (1976), *cert. dismissed as improvidently granted*, 432 U.S. 183 (1977), the Colorado Supreme Court predicted the havoc it would create five years later in recognizing a constitutionally protected interest under § 1983 with respect to the family relationship:

> Furthermore, the state did not directly attempt to restrict (the mother's) own personal decisions relating to procreation, contraception, and child-rearing which are involved in *Griswold v. Connecticut* (citation omitted), and *Meyer v. Nebraska* (citation omitted). Although the death of a family member represents a loss to her, we, nonetheless, are of the opinion that § 1983 was not designed to compensate for these collateral losses resulting from injuries to others. *Otherwise, damages would infinitely extend not only to parents and children, but to siblings and perhaps even to a 'family' of close friends*. The interests protected by § 1983 are adequately vindicated when actions are brought by the injured parties themselves, or at their death, by those designated in our wrongful death statute. (emphasis added.)

Some of the elements of a family relationship alluded to by the Colorado Supreme Court to justify its holding below — association, care, nurture, and companionship — can apply equally to the relationship between siblings. It is not difficult to conclude that once one relationship in the family is afforded rights of redress pursuant to § 1983, then every other relationship within the family must be recognized as having been afforded the same rights. The utter chaos that would result is self-evident.

A § 1983 claim based on the sibling relationship was addressed in *Sanchez v. Marquez*, 457 F. Supp. 359 (D. Colo. 1978). The court focused on whether there is an individual constitutional right to the continuation of another's life. While that court allowed for the possibility of a right existing in a parent with respect to a child, the court concluded that a relationship between siblings was a difference in kind that unquestionably was not protected by the Constitution. Such rationale is equally applicable to that relationship of a child to the parent addressed herein.

As this Court has stated in *Roe v. Wade*, 410 U.S. 113, 152 (1973), only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty are afforded constitutional protection. The right of a child to a relationship with his father, or with any other family member, cannot be deemed to meet this test. Neither does such a right involve a question of freedom of personal choice in matters of marriage and family life which constitute constitutionally protected liberty interests. *See Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Cleveland Board of Education v. Le Fleur*, 414 U.S. 632 (1974); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Since § 1983 gives rise to no rights at all, but merely provides a remedy to vindicate deprivation of existing rights, *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-618 (1979), § 1983 does not afford a child a personal right of vindication with respect to his family relationship absent a constitutionally derived right.

The child's dependency upon the parent for custody, care, and nurture, can be substantially affected short of death of the parent. For example, if the parent, though living, was taken away from the child through false imprisonment and thereby isolated from the family relationship, then the child's "custody, care and nurture" would suffer nearly to the same degree as if the parent had been killed. If the Colorado Supreme Court correctly recognized a child's constitutional liberty interest in the continuing family relationship with the parent, then such wrongful action by the state would give rise to a § 1983 claim of the child under such circumstances of false imprisonment. Logically, the fact that the parent was merely falsely imprisoned, as opposed to being killed, would only go to the extent of damages recoverable, and such fact would not go to the right to bring the § 1983 claim in the first instance. Even the parent's false imprisonment of merely two days would still give rise to a § 1983 claim in each of the children, and the two-day duration would simply be a limiting factor on the damages recoverable.

Since "death" is not a prerequisite to the Colorado derived § 1983 claim, the existence and provisions of the Colorado Wrongful Death Statute, C.R.S. 1973, § 13-21-202, which are triggered only by death, are wholly inapplicable to the finding of the Colorado Supreme Court, given the premise upon which that court relied. Furthermore, as this Court recognized in *Jones v. Hildebrandt, supra*, Colorado's wrongful death law can be classified as a property tort action and cannot be classified as a tort action for injuries to the person. 432 U.S. at 135-136, citing *Fish v. Liley*, 120 Colo. 156, 163 (1949).

Contrary to the intimations of the Colorado Supreme Court, it is axiomatic that a constitutionally grounded right in a survivor that may be asserted pursuant to § 1983 is not compelled recognition simply on the basis that failure to do so would leave survivors with inadequate remedies under state law. Cf. *Robertson v. Wegmann*, 436 U.S. 584 (1978). The Colorado court's discussion of remedies available to survivors under state law is irrelevant to its holding.

Whether or not there exists under the Constitution a right in the child to a continuing family relationship must be decided independent of any consideration concerning remedies otherwise available to a surviving child under existing state law. It is not contested by Petitioners that the right created under Colorado state law pursuant to its wrongful death statute would be separate from, and unrelated to, that purported constitutional right in the child to a continuing family relationship recognized by the Colorado Supreme Court. As stated in reference to a prior Colorado decision that had found such an interrelationship:

> [I]t is far from evident that the Colorado Supreme Court was correct in ruling that a § 1983 death action is tied to state law.

Jones v. Hildebrant, supra, 432 U.S. at 190 (White, J., dissenting).

Assuming the Colorado Supreme Court was correct in its constitutional finding, the remedy available to the surviving child under § 1983, whose own constitutional rights have been infringed, would be no different than the § 1983 remedy available to the decedent had he survived. This only serves to underscore the critical and profound ramifications that can be expected if this Court were to follow the holding of the court below.

However, while the wrongful death statute of Colorado relates in no manner to the issue of whether there exists a child's constitutional right to a continuing family relationship, it is not difficult to perceive that the Colorado Supreme Court nonetheless took the wrongful death statute into consideration (and its attendant limitation on damages) in making its consitutional determination. The motivation of the Colorado Supreme Court in seeking to create a cause of action in survivors that would not be subject to such statutory limitations is manifest, however misguided. Yet, such was clearly not the purpose of § 1983.

The Colorado Supreme Court's unprecedented interpretation of § 1983 and the Fourteenth Amendment warrants the same concern expressed by this Court in *Paul v. Davis*, 424 U.S. 693, 701 (1976):

> We, too, pause to consider the result should respondent's interpretation of § 1983 and of the Fourteenth Amendment be accepted.
>
> * * * *
>
> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent.

The endless consequences that will result if the Colorado Supreme Court is upheld are readily apparent. Once a child's constitutional right to a continuing family relationship with a parent is recognized, then similar constitutional protection of other family relationships will be required, such as those between siblings, between husband and wife, and between parent and child. Perhaps this may even extend to relationships with grandparents, aunts and uncles, and cousins. Such a result, coupled with the fact that such constitutional rights can be readily contravened short of state action causing death, portends the opening of a Pandora's Box of newly derived and limitless § 1983 claims with limitless damages. A police officer committing a single wrongful act to a single family member would be subject to numerous independent claims, limited only by the number of persons who constitute the victim's family. Each individual family member would have a right to recover because each possessed a constitutional right.to a continuing family relationship with that victim that would warrant vindication. The measure of damages as to each such claim would be determined wholly independently of the other related family members' claims. The prospect of multiple damage recoveries upon muliple claims against a single officer for a single wrongful act (be it anything from false arrest to homicide) against a single person must be foreclosed by this Court.

II.

The Only Remedy Available to a Surviving Child Where the State Has Wrongfully Caused the Death of His Parent Is That Afforded Pursuant to State Statute

A child's remedy arising from wrongful state acts that affect his continuing family relationshps, *where he himself is not the victim*, must be governed exclusively by State law. In Colorado, such a remedy arises only in the event of the *death* of a family member, and then only pursuant to Colorado's Wrongful Death Act. It is not contested that, having created the remedy, the State may not violate the due process or equal protection provisions of the Fourteenth Amendment with respect to such remedy. *Paul v. Davis, supra*. The remedy that Colordo gives under these circumstances limits the surviving heir to a property tort action with damages confined to "net pecuniary loss" (*see Fish v. Liley, supra;* and *Herbertson v. Russell*, 150 Colo. 110, 371 P.2d 422 (1962)). Such state created remedy, while afforded the protection of the Fourteenth Amendment, does not contravene the Fourteenth Amendment. Cf., *Robertson v. Wegmann, supra*. As stated by this Court in *Parratt v. Taylor*, ____, U.S. ____, 1201 S. Ct. 1908, 1917 (1981):

> Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process.

Conclusion

For the reasons set forth, it is respectfully submitted that the Supreme Court of the State of Colorado erred in reversing the trial court's dismissal of the Repondent children's § 1983 claims. Accordingly, the judgment of the Colorado Supreme Court recognizing a personal 42 U.S.C. § 1983 claim in the children of the deceased should be reversed.

Respectfully submitted,

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No. 81-534

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN O'DELL, GARY GRAHAM and DAVID NEIL,
ARTHUR DILL, CHIEF OF THE CITY OF DENVER, and
THE CITY AND COUNTY OF DENVER,
Petitioners,

v.

ANDREW ESPINOZA, individually and as Personal
Representative of the Estate of Arthur Espinoza, deceased,
and as guardian of JEANNE ESPINOZA, JR.,
BARRY ESPINOZA, BEVERLY ESPINOZA,
heirs-at-law of the deceased, and the
ESTATE OF ARTHUR ESPINOZA, deceased,
Respondents

**On Writ Of Certiorari To The
Supreme Court Of The State Of Colorado**

BRIEF OF RESPONDENTS

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OPINION BELOW

The Colorado Supreme Court's opinion, as modified on rehearing, is contained in the Appendix to the Petition of Writ of Certiorari. It is reported at 633 P.2d 455 (1981).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

28 U.S.C. Section 1257(3): Certiorari.

CONSTITUTIONAL PROVISION AND STATUTES

U.S. Constitution Amendment XIV: SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

42 U.S.C. § 1983: Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985(3): If two or more persons in any State or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth in this

section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, any party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1988: The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the constitution and laws of the United States, shall be extended to and govern the said courts in the trial and dispositionof the cause and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

C.R.S. 1973 § 13-21-201: Damages for death.

(1) When a person dies from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant or employee while running, conducting, or managing any locomotive, car, or trains of cars, or of any driver of any coach or other conveyance operated for the purpose of carrying either freight or passengers for hire while in charge of the same as a driver, and when any passenger

dies from an injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or other conveyance operated for the purpose of carrying either freight or passengers of hire, the corporation or individuals in whose employ any such officer, agent, servant, employee, master, pilot, engineer, or driver is at the time such injury is received, and resulting from or occasioned by the defect or insufficiency above described shall forfeit any pay for every person and passenger so injured the sum not exceeding ten thousand dollars and not less than three thousand dollars, which may be sued for and recovered:

a) By the husband or wife of deceased; or

b) If there is no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of the deceased, or

c) If the deceased is a minor or unmarried, then by the father or mother who may join in the suit, and each shall have an equal interest in the judgment; or if either of them is dead, then by the survivor.

(2) In suits instituted under this section, it is competent for the defendant for his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency. If the action under this section is brought by the husband or wife of the deceased, the judgment obtained in said action shall be owned by such persons as are heirs at law of the deceased under the statutes of descent and distribution, and shall be divided among such heirs at law in the same manner as real estate is divided according to said statute of descent and distribution.

C.R.S. 1973 § 13-21-202: Action notwithstanding death. When the death of a person is caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable for damages notwithstanding the death of the party injured.

C.R.S. 1973§ 13-21-203: Limitation on damages. (1) All damages accruing under section 13-21-202 shall be sued for and recovered by the same parties and in the same manner as provided in section 13-21-201, and in every such action the jury may give such damages as they deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue; and also parties who may be entitled to sue; and also have regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect, or default; except that if the decedent left neither a widow, widower, nor minor children, nor a dependent father or mother, the damages recoverable in any such action shall not exceed forty-five thousand dollars. No action shall be brought and no recovery shall be had under both sections 13-21-201 and 13-21-202 and in all cases the plaintiff is required to elect under which section he will proceed. (2) This section shall apply to a cause of action based on a wrongful act, neglect, or default occurring on or after July 1, 1969. A cause of action based on a wrongful act, neglect, or default occurring prior to July 1, 1969, shall be governed by the law in force and effect at the time of such wrongful act, neglect or default.

STATEMENT OF THE CASE

Arthur Espinoza, father of Respondents Jeanne Espinoza, Beverly Espinoza, Judith Espinoza, Barry Espinoza, Andrew Espinoza, and Arthur Espinoza, Jr., was shot to death in a park by Denver police officers. His sons and daughters then filed suit against the officers and the city in state court, based on violations of the civil rights of the decedent and his children under 42 U.S.C. §§ 1983 and 1985(3). The lawsuit did not allege or seek recovery under the Colorado Wrongful Death Statute. *See* §§ 13-21-202 and 13-21-203, C.R.S. 1973.

The state trial court dismissed the Complaint based on *Jones* v. *Hildebrant*, 191 Colo. 1, 550 P.2d 339 (1976), *cert. dismissed*, 432 U.S. 183, 97 S.Ct. 2283, 53 L.Ed2d 209 (1977). In *Jones*, the Colorado Supreme Court held that in death cases, federal civil rights claims "merged" with the state wrongful death claim, and hence, that the surviving mother of a youth killed by the police did not have a cognizable claim for relief under the federal civil rights acts. Because of *Jones*, the trial court held in this case that dismissal for failure to state a claim was mandated.

The Colorado Supreme Court reversed, overruling *Jones*. In so doing, the Colorado court held that since the state wrongful death statute was designed purely to compensate for property losses, it could not properly restrict federal civil rights claims, which, in accordance with Congressional intent, were designed to deter as well as compensate. *Espinoza* v. *O'Dell*, ____ Colo. ____, 633 P.2d 455 (1981). *See also Jones* v. *Hildebrant*, 432 U.S. 183, 97 S.Ct. 2283, 53 L.Ed2d 209 (1977)

In this regard, the Colorado court concluded first that Arthur Espinoza's children did have a claim for relief as a matter of federal law. It also held that pre-existing state law barring recovery of punitive damages in wrongful death cases, and the limitation of recovery in death cases to "net pecuniary loss," or economic property damage, were inconsistent with the federal Civil Rights Acts, and hence, would not be applied to civil rights litigation under those statutes.

SUMMARY OF ARGUMENT

The Colorado Wrongful Death Statute cannot be utilized to restrict compensatory and deterrence recovery in actions brought under the Civil Rights Act provisions of 42 U.S.C. §§ 1983 and 1985(3). Violations of federal rights are enforceable through federal legislation without regard to state wrongful death legislation, and the children of a person who has been unlawfully put to death by state officers have a claim to compensation above and beyond recovery of mere "property loss." Their claims must include compensation for the loss of the deceased parent's love, companionship, and guidance, and punitive damages for deterrence purposes must be recoverable in appropriate and proper cases.

ARGUMENT

This case presents the Court with an excellent opportunity to illuminate one of the darkest passageways of Federal law: the meaning, scope, and remedies provided by 42 U.S.C. §§1983, 1985(3) and 1988. These remedial "Reconstruction civil rights statutes," *United States* v. *Price*, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), were enacted as part of the 1866 and 1870 Civil rights Acts and the Ku Klux Klan Act of 1871. These statutes clearly provide for a civil claim for relief to "the party injured" or "any party so injured or deprived" as a result of deprivations of civil rights under color of state law. Unfortunately, however, these enactments were and are silent as to the proper parties plaintiff, the nature of their claims, the types of damages recoverable, and even, to a certain extent, the specific source of law to be turned to for enlightenment. Until now, this Court has not had the chance to consider these basic questions crucial to the interpretation of these federal statutes. *Cf. Jones* v. *Hildebrant, supra* (dissenting opinion of Justice White).

At stake are the civil rights of our citizenry, as protected through Federal legislation enacted at the close of the nation's Civil War. This Court's duty is to preserve the integrity of the Civil Rights Acts, which have survived, essentially unchanged, to the present day. Hence the Court must look to the legislative history and the legislation itself in order to insure that Congressional intent is furthered.

The pertinent statutes are sadly lacking in detail, only sketching the barest parameters of recovery. In this regard, neither 42 U.S.C. §§ 1983 nor 1985(3) describes who the "injured" parties are when death occurs, nor do they set forth the elements of recoverable damages. One thing is clear, however: the Congressional intent was to deter official lawlessness and to compensate the bereaved families of victims of the then-rampant state and local acts of officially-condoned murder.

No one could seriously question that the legislative intent in passing these statutes was to provide remedies in death cases, as well as recovery in situations were non-fatal injuries were inflicted. The Congressional purpose for passage of these Acts was to provide a "positive punitive civil remedy" rather than compensation for specific physical or financial injury. Niles, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 Tex. L.Rev. 1015, 1026 (1967). Such modern extrapolation of congressional intent is borne out by reference to the legislative history. For example, President Grant's message to Congress referred specifically to losses of life which prompted his request for remedial federal legislation. *See Cong. Globe*, 42 Cong., 1st Sess., p. 244. Floor debates on the bill frequently reflected that theme. For example, Senator Lowe of Kansas stated:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper correction. (*Cong. Globe*, 42d Cong., 1st Sess., p. 374).

Similarly, Congressman Butler, is trying to convince his colleagues that municipalities should be liable under the civil rights acts, stated that:

> This then is what we offer to a man whose house has been burned, as a remedy; to the woman whose husband has been murdered, as a remedy; *to the children whose father*

> *has been killed as a remedy*. (Cong. Globe, 42d Cong., 1st Sess., p. 807). (Emphasis supplied). *See also Cong. Globe*, 42d Cong., 1st Sess., p. 321 (protection for life); *Cong. Globe*, 42 Cong., 1st Sess., p. 370 (Act passed in hopes of achieving a civilization "in which every man's house is defended against murder and arson . . ."); *Cong. Globe*, 42d Cong., 1st Sess., p. 428; *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed2d 492 (1961).

It is not surprising, therefore, that the courts have uniformly held that Congress intended the civil rights acts to apply where the deprivation of constitutional entitlement resulted in death. *See, e.g., Brazier* v. *Cherry*, 203 F.2d 401 (5th Cir. 1961) *cert. denied*, 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed.2d 136; *Hall* v. *Wooten*, 506 F.2d 564 (6th Cir. 1974); *Beard* v. *Robinson*, 563 F.2d 331 (7th Cir. 1977); *Perkins* v. *Salafia*, 338 F.Supp. 1325 (D.Conn. 1972). *See also Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Moor* v. *County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 n.14 (1973).

> [It] defies history to conclude that Congress purposely meant to assure to the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil rights statutes against the peril of death. The policy of the law and the legislative aim was certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which would cripple. *Brazier* v. *Cherry*, *supra*. *See also Green* v. *Carlson*, 581 F.2d 669 (7th Cir. 1978).

Without question, therefore, § 1983 and § 1985 actions are properly brought even when the constitutional deprivation results in the death of the principal victim of violence. As was stated in *Bell* v. *Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946):

> [W]here federally protected rights have been involved, it has been the rule from the beginning that courts will be

> alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to right the wrong done.

See also Green v. *Carlson, supra; Basista* v. *Weir*, 340 F.2d 74 (3rd Cir. 1965); *Salazar* v. *Dowd*, 256 F.Supp. 220 (D.Colo. 1966).

Thus,

> Where existing law imposes a primary duty violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death. *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). *See also Sea-Land Services* v. *Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974).

The next question to be addressed is the who: Who will enforce and prosecute a civil rights action where death has occurred? Either Arthur Espinoza has a claim, through his estate, for the savage injury done to him, or his heirs have actions for the deprivation of their constitutional associational rights, or both. If not, the intent of Congress in the passage of the Civil Rights Acts would be completely circumvented.

The clear import of the legislative history and this Court's decisions concerning familial and associational rights makes clear that *both* the estate of Arthur Espinoza *and* his children have federally-created and protected claims for relief as a result of his death. Arthur Espinoza's claim for the violation of his civil rights resulting in death survives to the benefit of his estate and heirs; his grief-stricken children have a separate claim for the deprivation of their familial and associational rights.

Certainly Congress intended for survival of civil rights acts claims when death occurred, and the logical beneficiary would be the estate of the deceased. The critical distinction necessary to be recognized here, however, is that the *individual* plaintiffs in this case, Arthur Espinoza's children, have suffered personal federally-protected losses, not merely state law losses resulting from "wrongful death." The injury to these children is their loss of a father, a beloved parent, by acts of official lawlessness. Their injury is not based on mundane monetary considerations as this Court recognized in *Jones* v. *Hildebrant, supra*. These federal civil rights claims are personal actions based on individual constitutional rights, constituting something substantially diverse from traditional common law or statutory tort claims. *Jones* v. *Hildebrant, supra*. *See also Goodman* v. *Parwatikar*, 570 F.2d 801 (8th Cir. 1978); *Sanchez* v. *Marquez*, 457 F.Supp. 362 (D.Colo. 1978).

Thus, although the same facts can give rise to violations of both the federal civil rights statutes and a state's wrongful death enactment, the deprivation of a constitutional right is "significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." *Monroe* v. *Pape, supra*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) (Concurring opinion of Justice Harlan). *See also Taylor* v. *Nichols*, 558 F.2d 561 (10th Cir. 1977).

The decisions of this Honorable Court make clear that both the right to life and the parent-child relationship are constitutionally protected under the due process clause. The cases in this area are replete with holdings supporting, at least analagously, the proposition that children have a constitutional right and interest in the continued well-being and life of their parents.

For example, recognizing the right to marry and bring up children are *Meyer* v. *Nebraska*, 262 U.S. 290, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Inherent in the familial rights is the concomitant right to remain a member of a family unit without official interference. Instructive in this regard is *Stanley* v. *Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). *See generally Whalen* v. *Rowe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977).

Indeed, *Stanley* v. *Illinois* acknowledged that the Court had "frequently emphasized the importance of the family" in its prior decisions, noting that "the integrity of the family unit has found protection" in both the Ninth and Fourteenth Amendments. These familial considerations were held to constitute "cognizable and substantial" interests which included personal rights premised on continued rights of companionship and care. *Stanley* v. *Illinois*, *supra*. *See also Quilloin* v. *Walcott*, 434 U.S. 246, 98 S.Ct. 545, 54 L.Ed.2d 511 (1978); *Wisconsin* v. *Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Prince* v. *Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944).

These decisions fully support the decisions of several lower federal courts upholding a parent's right to recover for the death of a child. *See Mattis* v. *Schnarr*, 547 F.2d 1007 (8th Cir. 1976) (II) *vacated as moot sub nom. Ashcroft* v. *Mattis*, 431 U.S. 171, 97 S.Ct. 1739, 52 L.Ed.2d 219 (1977); *Mattis* v. *Schnarr*, 502 F.2d 588 (8th Cir. 1974) (I); *Smith* v. *Wickline*, 396 F. Supp. 555 (W.D. Okla. 1975); *Landrum* v. *Moats*, 576 F.2d 1320 (8th Cir. 1978); *Jones* v. *McElroy*, 429 F.Supp. 858 (E.D. Pa. 1977). *Mattis* v. *Schnarr*, (I & II), *supra*, should be given particular significance, inasmuch as these decisions involved the Missouri wrongful death satute, upon which the Colorado wrongful death act was based. *See Hayes* v. *Williams*, 17 Colo. 465, 30 P. 352 (1892); *Note, The Propriety of Punitive Damages Under Colorado's Wrongful Death Statute*, 49 Denver L.J. 81 (1972). If parent has such rights in child's life, so too child has an interest in parent's life and well-being.

As was indicated in *Hall* v. *Wooten, supra,* the intent of Congress in enacting the civil rights acts was to permit survivors to bring actions arising from the death of their parents or children under §§ 1983 ad 1985, regardless of state law. Reference to the pertinent Congressional debates mandates this conclusion, since the point of the legislation was to put an end to the refusal of the states themselves to protect their inhabitants' lives. The court's discussion of the question in *Mattis* v. *Schnarr* (I), *supra,* is particularly instructive:

> The familial relationship between parent and child is fundamental to our civilization. The family is the foundation of society and hence the state. The traditions and common heritage of our people have always stressed the importance of the family bonds. . . .
>
> To determine whether a right is protected by the due process clause, a court must look to the 'traditions and (collective) conscience of our people' to determine whether a principle is 'so rooted there . . . as to be ranked as fundamental.' The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.

Petitioners cite *Quilloin* v. *Walcott, supra; Meyer* v. *Nebraska, supra;* and *Prince* v. *Massachusetts, supra,* for the proposition that an "absolute constitutional liberty interest in the relationship between the father and son does not exist." (Brief of Petitioners, page 7). What this ignores, however, is the clear holding of these decisions in delineating constitutionally protected associational rights in the parent-child relationship.

Where there is no surviving spouse who, indeed, has the better right than the child to cry out for redress when a father's life has been forfeited? Should a parent's death at the hands of state or municipal officers go unavenged simply because the ultimate injury, death, has been unlawfully inflicted, so that he or she may not pursue legal redress personally? The parent-child relationship may not be boundless, but surely it includes the right to be free from permanent irrevocable termination through infliction of fatal injury, and the right to pursue the vindication of the violation of the deceased parent's own right to continued life.

As was stated in *Brazier* v. *Cherry, supra,* 42 U.S.C. §§1983 and 1985 evince a "clear congressional policy to protect the life of the living from the hazard of death caused by unconstitutional deprivation of civil rights . . ." The question presented here is simply one of statutory interpretation, and it is undisputed that Congress intended to create an "effective enforceable right." *Brazier* v. *Cherry, supra.*

Obviously, where death occurs, only a decedent's heirs can rectify, by civil suit, the denial of the decedent's civil rights and the denial of the heirs' own rights resulting because of the loss of their parent. For this reason, the decision of the Colorado Supreme Court should be affirmed in this regard.

II

ARGUMENT

The Colorado Wrongful Death And Survival Statutes, As Enacted And Interpreted By Applicable State Decisions, Are Inconsistent With and Adversely Affect Federally-Protected Civil Rights To Life And Family

The next question is whether Colorado law is inconsistent with the Federal policies sought to be advanced by 42 U.S.C. §§ 1983 and 1985. The admitted absence within the civil rights acts of specific references to the types and elements of recoverable damages requires reference either to other Federal statutes, state law, or the creation of entirely new Federal law in this area. Pertinent in this regard is 42 U.S.C. § 1988, which provides for enforcement of the civil rights acts:

> . . . in conformity with the law of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court have jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the constitution and the laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .

One commentator has concluded, after extensive review and consideration of legislative history and decisional authority, that this statute is only applicable in actions removed from state to Federal court pursuant to 28 U.S.C. § 1443. Eisenberg, *State Law and Federal Civil Rights Cases: The Proper Scope of Section* 1988, 128 Penn. L.Rev. 499 (1980). This conclusion, however, is somewhat at odds with the decisions of this Court.

What is clear, and what is consistenly reflected in this Court's decisions, is the realization that where Federal law is deficient, or state law "would be inconsistent with the Federal policy underlying the cause of action under consideration," an independent Federal remedy must be formulated. *See Robertson* v. *Wegmann,* 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978). *See also Johnson* v. *Railroad Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975); *Bell* v. *Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). This may include formulation by this Court, in the first instance, of the law in this area. Indeed, this was contemplated by Congress, with some measure of foreboding. *See* the remarks of Representative Kerr of Indiana, *Cong. Globe,* 39th Cong., p. 1271.

Although the uneasy and unclear relationship between Federal and state law in the civil rights field was somewhat clarified by *Robertson* v. *Wegmann, supra,* the details of civil rights recovery, when death occurs, remain to be established. In *Robertson* v. *Wegmnn,* this Court opined as follows:

> [T]he decision as to the applicable survivorship rule is governed by 42 U.S.C. § 1988. This statute recognizes that in certain areas "federal law is unsuited or insufficient 'to furnish suitable remedies' "; federal law simply does not 'cover every issue that may arise in the context of a federal civil rights action.' (Citation omitted) When federal law is thus 'deficient,' § 1988 instructs us to turn to 'the common law, as modified and changed by the constitution and statutes of the [forum] State,' as long as these are 'not inconsistent with the Constitution and the laws of the United States.' . . . Regardless of the source of the law applied in a particular case, however, it is clear that the ultimate rule adopted under § 1988, ' "is a federal rule responsive to the need whenever a federal right is impaired.' "

The express purpose of § 1988, as shown by this Court's holdings, is to make available redress which will effectuate the broad policies of the federal civil rights statutes. *See Brazier* v. *Cherry, supra; Smith* v. *Wickline, supra.* As one court put it: "The Supreme Court has construed § 1988 to incorporate into the federal civil rights laws state rules of liability insofar as they serve the policies of the federal statutes more effectively than federal rules of liability." *Carter* v. *Carlson,* 447 F.2d 358 (D.C. Cir. 1971) Since these broad policies include a "clear congressional policy to protect the life of the living from the hazard of death caused by unconstitutional deprivations of civil rights. . . .," *see Brazier* v. *Cherry, supra,* state law which shelters or indemnifies an official wrongdoer from liability is inconsistent with Federal law and cannot be utilized.

The question faced by the Colorado Supreme Court in this case was the extent to which Colorado's Wrongful Death and

Survival Statutes were inconsistent with the policies sought to be furthered through the Federal Civil Rights Act, or rather, whether the State law advanced congressional policy and therefore could be incorporated and adopted as Federal law. *See Brazier* v. *Cherry, supra*. Specifically, in this case the Colorado Supreme Court considered the "net pecuniary loss" rule, the damages "ceiling" of $45,000.00 where a spouse or dependent does not survive, and decisional authority precluding awards of punitive damages in wrongful death cases. *See Jones* v. *Hildebrant, supra; Herbertson* v. *Russell,* 150 Colo. 110, 371 P.2d 422 (1962); *Kogul* v. *Sonheim,* 150 Colo. 316, 372 P.2d 731 (1962) (net pecuniary loss rule); *Pierce* v. *Conners,* 20 Colo. 178, 37 P. 721 (1894) (net pecuniary loss); *Moffatt* v. *Tenney,* 17 Colo. 189, 30 P. 348 (1892) (no punitive damages).

Clearly the damages "ceiling" provided by § 13-21-203, C.R.S. 1973, runs contrary to the congressional intent to deter official wrongdoing. This statute mainfestly limits deterrent effect, especially since state law requires municipalities to indemnify peace officers in such cases up to awards of $100,000.00. *See* § 29-5-111, C.R.S. 1973.

Similarly, state decisions precluding exemplary or punitive damages in death cases guarantee that individual civil rights violators will escape civil liability. Although the language of § 13-21-203, C.R.S. 1973, appears to call for punitive damages awards, State decisional authority has consistently barred exemplary damages in state wrongful death or survival lawsuits. *See Lehrer* v. *Lorenzen,* 124 Colo. 17, 233 P.2d 382 (1951) (wrongful death act); *Herbertson* v. *Russell, supra* (wrongful death act); *Estate of Burron* v. *Edwards,* 594 P.2d 1064 (1979) (survival statute). This flies in the face of federal legislative intent to deter as well as compensate, and hence, Colorado law in this regard cannot be engrafted onto 42 U.S.C. § 1983 and 1985.

Unquestionably, the damages "ceiling" and the ban on punitive damages in Colorado death cases, if applied to federal civil rights actions, would cripple enforcement of the civil rights acts in complete disregard of congressional intent. *Contrast Parratt* v. *Taylor*, ____ U.S. ____ , 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (state law tort claim would fully compensate).

Similarly, the "net pecuniary loss" rule does not serve the policy of preventing official illegality resulting in death, since the real loss is that of a human life, not of dollars and cents. Colorado law in this regard permits heirs under the wrongful death act to recover only for lost financial benefits, and not for grief, loss of love, companionship, or other non-pecuniary losses to those persons. *Lehrer* v. *Lorenzen, supra; Pierce* v. *Connors, supra*.

Even more restrictive are the statute and decisions governing recovery in survival actions. Under § 13-20-101, C.R.S. 1973, although an action by the decedent "survives," all that lives on is the right of the deceased person's estate to recover for loss of earnings and expenses incurred prior to death! In Colorado, no action exists or survives to recover for "pain, suffering, or disfigurement," nor for loss of earnings which would have been earned, nor even for the loss of life itself. § 13-20-101, C.R.S. 1973; *Kansas Pacific Railway Co.* v. *Miller*, 2 Colo. 442 (1874). In other words, where death quickly follows the wrongful act, no action even for compensatory damages survives as against a wrongdoer. These principles of Colorado death law are, simply stated, completely antagonistic to the aims sought to be advanced by Congress in the passage of 42 U.S.C. §§ 1983 and 1985.

As was stated by the majority in the opinion dismissing certiorari in *Jones* v. *Hildebrant, supra:*

> Whatever the merits of her constitutional liberty claim in her own right, a question on which we do not intimate an opinion, it would not seem logically to be subject to a damage limitation contained in the statute permitting survivors to recover for wrongs done to a property interest of theirs.

Similarly, neither can a state eliminate, through legislation, the right to recover deterring punitive damages, damages to a decedent for loss of life beyond loss of interim wages, and associational damages accruing to the survivors of the victim of a fatal civil rights violation.

This view was adopted by the Colorado Supreme Court in its opinion in this case. The Colorado Supreme Court concluded that the net pecuniary loss rule's limitation of damage to loss of financial benefit deprives § 1983 plaintiffs of compensation for losses "flowing from a variety of associational interests, such as paternal love and care, instruction, counseling, emotional support, and the family's mutual enjoyment of life together." Since these real losses are clearly aspects of liberty and life, federal civil rights recovery in death cases cannot properly be restricted to monetary loss. The Colorado Court also implicitly rejected use of the $45,000.00 damages limit, and expressly rejected applicability of the state's bar on punitive damages in death cases.

Hence, in this case the Colorado Supreme Court has attempted to effectuate the federal policies sought to be furthered by 42 U.S.C. §§1983 and 1985(3) by ruling that, as a matter of federal law, the Colorado Wrongful Death and Survivor Statutes are inconsistent to those federal policies, a determination which must be made under 42 U.S.C. § 1988. The federal remedy which must follow should be formulated under § 1988, in such a manner as to be "adapted to the object" of the civil rights statutes: to deter official lawlessness and provide full compensation to the victims of that lawlessness and their survivors. As was stated by this Honorable Court in *Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969):

> This means, as we read § 1988, that both federal and state rules on damages may be utilized, *whichever better serves the policies expressed in the federal statute*. The rule of

> damages, whether drawn from federal or state sources, is a federal rule responsive to the need wherever a federal right is impaired. (emphasis supplied)

To allow the states to exclude the remedy in the state court would tend to flood the federal court with federal civil rights actions. It will also permit fifty separate interpretations of federal law protecting federal civil rights.

CONCLUSION

In this case, the rule of damage as expressed by the Colorado Supreme Court in its opinion below is fully responsive to the federal need and clearly best serves the policies expressed in the civil rights acts. For these reasons, Respondents respectfully request that this Honorable Court affirm the holding and opinions of the Colorado Supreme Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN O'DELL, GARY GRAHAM and DAVID NEIL, ARTHUR DILL,
Chief of Police of the City of Denver, and the CITY AND
COUNTY OF DENVER,

Petitioners,

vs.

ANDREW ESPINOZA, individually and as Personal Representative
of the Estate of Arthur Espinoza, deceased, and as guardian of
JEANNE ESPINOZA, JR., BARRY ESPINOZA, and BEVERLY
ESPINOZA, heirs-at-law of the deceased, and the ESTATE OF
ARTHUR ESPINOZA, deceased,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF COLORADO

REPLY BRIEF OF THE PETITIONERS

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ARGUMENT

I. THE ISSUES BEFORE THIS COURT INVOLVE WHETHER A CHILD'S CONSTITUTIONAL RIGHT TO A FAMILY RELATIONSHIP EXISTS; THEY DO NOT CONCERN THE ADEQUACY OF REMEDIES UNDER THE COLORADO WRONGFUL DEATH AND SURVIVOR STATUTES

Respondents' Brief and the Amici Curiae Brief abound in confusion when discussing what they perceive to be the issues presently before this Court. Contrary to their assertions, the issues do *not* concern whether deprivation of *decedent's* constitutional rights can be vindicated under existing state and federal law. It is agreed that they can be so vindicated. The Colorado Supreme Court followed that which this Court recognized in *Robertson v. Wegmann*, 436 U.S. 584 (1978), in allowing for deprivation of a decedent's civil rights to be vindicated pursuant to § 1983 in accordance with the state's survival statute. The Colorado Supreme Court went on to find that the "personal representative, who in this capacity alone has no constitutionally protected interest in the life of the decedent, is here properly limited to the damages set forth in the state survival statute." *Espinoza v. O'Dell*, Colo., 633 P.2d 455, 466 (1981). Neither the Petitioners nor the Respondents have challenged the correctness of this finding in either the Petition for Writ of Certiorari or in the Response to said Petition.

The issue of whether the Colorado Wrongful Death and Survival Statutes are inconsistent with federal policies sought to be advanced by 42 U.S.C. §§ 1983 and 1985 simply was not raised in either the Petition or the Response thereto.[1] In any event, neither of these state statutes are relevant to a "living" victim. Both Colorado statutes are factually dependent upon the *decedent* being the victim.

The finding of the Colorado Supreme Court that is at issue and does form the basis for the instant action considers the *surviving child* to be the victim in recognizing a *child's* purported constitutional right to a continuing family relationship. The constitutional deprivation to be vindicated is that suffered by the child, not the child's deceased parent, as a result of alleged wrongful state intrusion into such family relationship. Thus, the adequacy of remedies under the Colorado Wrongful Death and Survival Statutes is not relevant to the issues raised by Petitioners.

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[1] It was improperly raised for the first time in Argument II of Brief of Respondents.

Where it is the deprivation of the child's constitutional right to a family relationship that is afforded vindication pursuant to the Colorado Supreme Court's rationale, it would be difficult to argue under that rationale that the damage remedy available to the child has limitations, just as it would be difficult to argue that there were limitations on damages if that same child had been deprived of his constitutional rights by virtue of having been assaulted. In either case it is the child who is wronged. Since the child is living, the wrongful death and survival statutes cannot apply.

Further confusion has been wrought by Respondents and Amici in reference to a so-called "§ 1983 wrongful death action." If the axiom that one cannot sue for deprivation of another person's civil rights is accepted, then the purported § 1983 wrongful death action cannot exist as a matter of definition.

II. THE CONSTITUTIONAL ISSUE RAISED BY PETITIONERS REQUIRES RESOLUTION BY THIS COURT

The Amici contend that this Court need not decide the issue raised by Petitioners relating to the constitutional protection afforded a family relationship. However, their argument is premised on a misinterpretation of the record below.

An analysis of Respondents' First Amended Complaint (Joint Appendix, pp. 3-6), reveals that essentially two types of claims are being set forth:

(1) The "survival" claims asserted by the personal representative of the estate (Andrew Espinoza) to vindicate deprivation of the *decedent's* constitutional rights; and

(2) The surviving children's personal constitutional claims for deprivation of their *own* constitutional rights.

The children did not seek to avail themselves of the remedy afforded them as heirs pursuant to the Colorado Wrongful Death Statute. Indeed, the district court provided in its Order (Joint Appendix, p. 10) that the surviving children were permitted to further amend their complaint to assert a claim pursuant to the Colorado Wrongful Death Statute. However, the Respondent-surviving children evidently decided not to pursue their wrongful death remedy. Instead, they chose to stand solely on their assertion of a § 1983 claim premised on deprivation of their own previously unrecognized constitutional right to a family relationship with their parent. Thus, the *only* claim the Respondent-surviving children have chosen to assert is premised on personal injury to them, and not injury to the deceased parent. The death of the father would be relevant only for the purpose of demonstrating an intrusion into the family relationship resulting in deprivation of the children's purported constitutional right to a family relationship.

Therefore, the children may assert a personal claim in the district court *only* if this Court affirms the Colorado Supreme Court's ruling that a child in fact possesses such a personal constitutional right to a continuing family relationship. Thus, contrary to the contention of the Amici, the children have no personal claims unless they obtain a favorable ruling from this Court. This factor undercuts the premise upon which Amici urge this Court not to rule on the Colorado Supreme Court's "novel"[2] constitutional interpretation that Petitioners contest. Therefore, it is manifest to both Petitioners and Respondents that this Court determine whether there are any existing civil rights claims that may be asserted by the Respondent-surviving children in their *individual* capacity.

It is clear that Amici have incorrectly interpreted the Colorado Supreme Court's decision. The Colorado court reversed the district court and remanded for trial *both* the claims of the personal representative pursuant to the survival statute and the claims of the Respondent-surviving children for injury they personally incurred. Petitioners have not taken issue with the Colorado Supreme Court's remanding of the *survival* claims. Therefore, if this Court grants the relief sought by Petitioners, the § 1983 survival claims to vindicate deprivation of the decedent's constitutional rights nonetheless remain and can be pursued in the district court.[3]

While the Respondent-surviving children as heirs would benefit collectively to some degree with respect to any recovery by the estate pursuant to a survival action, such recovery would be different in form and substance from that recovery each child could individually expect in the event this Court recognized a personal constitutional right in them to a continuing family relationship. Thus, resolution of

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[2] Amici's characterization — Amici Curiae Brief, p. 7.

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[3] Amici Curiae Brief, p. 12, incorrectly contends that Petitioners seek a complete dismissal of all claims.

the constitutional issue presented by Petitioners is clearly necessary since this will determine whether Respondent-children can sue, and benefit, in their own right, or simply benefit as heirs through the claim of the estate in a survival action.

III. WHETHER A CHILD POSSESSES A CONSTITUTIONAL RIGHT TO A CONTINUING FAMILY RELATIONSHIP WITH HIS PARENT MUST BE DECIDED ON CONSTITUTIONAL CRITERIA AND NOT ON THE BASIS OF AVAILABLE REMEDIES

As previously stated herein, the Respondent-children who are not the personal representative of the estate and who are seeking to sue in their individual capacities for deprivation of their personal constitutional rights, and who have voluntarily relinquished their right to assert claims pursuant to the Colorado Wrongful Death Statute, will have no claims whatsoever and cannot properly be parties to this lawsuit unless this Court were to recognize the existence of a child's personal constitutional liberty interest in the continuation of his family relationship with his parent. Whether or not such a right of the child exists under the Constitution must be determined upon criteria such as that set forth by this Court in *Roe v. Wade*, 410 U.S. 113, 152 (1973) (only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty are afforded constitutional protection). Such a right would exist irrespective of any presently existing remedy. Respondents' assertion that recognition of a constitutional right can be justified on the basis of remedies that would not otherwise be available, is contrary to the prior pronouncements of this Court. The adequacy of remedies available under state law has no relevance to the determination of whether or not a substantive right exists under the Constitution.

If the Colorado Supreme Court's constitutional finding is not reversed, there will be profound ramifications for the federal judiciary, for law enforcement and for public entities as a whole. The slightest wrongful state interference in the constitutionally protected family relationship will give rise to individual § 1983 claims for every person deemed to be a member of the "family" and thereby affected by such intervention. And each family member will be allowed recovery of damages in his own right. There simply would be "no logical stopping place" for asserting § 1983 claims. See *Paul v. Davis*, 424 U.S. 693, 701 (1976).

CONCLUSION

For the reasons set forth, it is respectfully submitted that the Supreme Court of the State of Colorado erred in reversing the trial court's dismissal of the Respondent-children's § 1983 claims. Accordingly, the judgment of the Colorado Supreme Court recognizing a personal 42 U.S.C. § 1983 claim in the children of the deceased should be reversed.

Respectfully submitted,

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No. 81-534

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

◆

JOHN O'DELL, GARY GRAHAM, DAVID NEIL, ARTHUR DILL, Chief of Police of the City of Denver, and the CITY AND COUNTY OF DENVER,

Petitioners,

—v.—

ANDREW ESPINOZA, individually and as Personal Representative of the Estate of Arthur Espinoza, deceased, and as guardian of JEANNE ESPINOZA, JR., BARRY ESPINOZA, and BEVERLY ESPINOZA, heirs-at-law of the deceased, and the ESTATE OF ARTHUR ESPINOZA, deceased,

Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE COLORADO LAWYERS COMMITTEE, *AMICI CURIAE*

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INTEREST OF *AMICI CURIAE**

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to the protection of the civil rights and liberties of Americans. Since its founding in 1920, one of the constant concerns of the ACLU has been the need to provide adequate legal mechanisms to protect against and remedy violations of constitutionally protected rights. Foremost among those mechanisms are the sanctions available under § 1983 against those state officials who abuse the official power entrusted to them.

The ACLU has frequently appeared before this Court in support of the historic role of 42 U.S.C. § 1983 in remedying violations of federal civil rights, and in deterring departure from constitutional standards.

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*Letters of consent to the filing of this brief are being lodged with the Clerk of the Court.

The Colorado Lawyers Committee is an affiliate of the National Lawyers Committee for Civil Rights Under Law, which was organized in 1963 at the request of President Kennedy to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Colorado Lawyers Committee has been keenly interested in litigation under 42 U.S.C. § 1983 in which minority-race individuals seek redress for unconstitutional police conduct, particularly the use of excessive physical force and including deadly force. The Colorado Lawyers Committee believes that broad principles of relief are essential to the fulfillment of the goals of that statute. In particular, the rules of damages applicable to § 1983 litigation must not only assure complete compensation for personal injuries resulting from the unjustified use of force by police officers; such rules must also assure that, in appropriate circumstances, exemplary damages can be awarded. It is necessary that police officials be acutely aware that egregious abuses of their authority may result in substantial damage awards against them, if such unconstitutional conduct is to be deterred.

STATEMENT OF THE CASE

The facts as alleged in respondents' complaint, though serious, are relatively straightforward: respondents allege that petitioners O'Dell, Graham and Neil "wrongfully shot and killed the decedent, Arthur Espinoza, while he was lying on the ground unarmed, and that such actions were undertaken willfully, maliciously, wantonly, recklessly, and with a willful and wanton disregard for the rights and feelings of the decedent ... "[1/] Respondents, proceeding in Denver District Court under 42 U.S.C. § 1983, sued for damages individually as children of decedent and in their capacity as heirs of decedent and representative of his estate. They alleged, *inter alia*, deprivation of decedent's right to due process of law, and of their own rights to their father's continued life, and claimed damages

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[1/] Joint Appendix (hereinafter "JA") 3.

based on the resulting injuries.

Petitioners moved to dismiss for failure to state a claim. The trial court, in ruling on petitioners' motion to dismiss, applied the rule set forth by the Colorado Supreme Court in Jones v. Hildebrant, 550 P.2d 339 (1976), cert. dismissed 432 U.S. 183 (1977). This decision held, in our view erroneously, that Colorado's wrongful death remedy would be engrafted onto a § 1983 action through § 1988 if brought in federal court, but that since the action was brought in state court and joined with a suit under the state wrongful death statute, the two actions merged so that the § 1983 claim should be dismissed. 550 P.2d at 344. Based on Jones, the Denver District Court dismissed respondents' complaint on the ground that "a cause of action under Sec. 1983 alone cannot be maintained in a state court for the wrongful death of the decedent." JA at 9.[2/]

On appeal, respondents framed the issues before the Colorado Supreme Court as whether the decedent's "civil rights claims against the individual defendants inure to his estate" and whether decedent's children have individual claims "based on deprivation of their constitutional rights arising out of the killing of their father by Denver policemen." Appellants' Opening Brief in the Supreme Court of Colorado 3. The Colorado Supreme Court discussed the issue of the availability of relief under

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[2/] This decision was based on the erroneous conclusion that § 1983 actions for deprivations of constitutional rights resulting in death are subject to the damage limitations of the state wrongful death act. *See* Point IIIB, *infra*. The confusing legal posture of this case, which suggests that *certiorari* might appropriately be dismissed as improvidently granted, may be due in large part to the Colorado Supreme Court's erroneous ruling in *Jones*.

§ 1983 and § 1988 to plaintiffs as representatives and heirs of the decedent by reference to the state wrongful death statute, Section 13-21-202 C.R.S. (1973) and survival statutes, Section 13-20-101(1) C.R.S. (1973). Espinoza v. O'Dell, 633 P.2d 455, 461-463, 465-466 (1981). Rather than basing its decision on the reasonably well-settled ground that respondents could proceed under § 1988 as representatives of the decedent's estate, however, the Colorado Supreme Court reached the novel constitutional issue, under the facts of this case, of a child's right to a continued relationship and association with its parent free from state interference. The Court found such a right to be liberty protected by the due process clause of the Constitution, and reversed the trial court's decision on this basis. It went on to set forth the rule of damages to be applied in the subsequent proceedings, holding that the respondent children's action based on such a right is governed by federal law, not by the state wrongful death damages limitations. Having concluded that the respondents were entitled to federally determined damages based on the deprivation of their own constitutional rights, the Colorado Supreme Court found it unnecessary to address explicitly the issue -- which was clearly before the court -- of the availability and scope of relief to plaintiffs in their capacities as heirs and representatives of the estate.[3]

This Court granted certiorari on December 14, 1981.

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[3] The Colorado Supreme Court appears to have framed its approach to the instant case in light of the overly restrictive and erroneous decision in Jones.

SUMMARY OF ARGUMENT

Because the case may be resolved on well-settled principles of § 1983 law, this Court need not and should not decide the novel and difficult constitutional issue of whether excessive use of force resulting in a parent's death would violate the respondent children's asserted constitutional right to continued family association. Respondents are entitled to proceed in this § 1983 action as representatives and heirs of the decedent. Since the judgment below must therefore be affirmed and the case remanded for trial, consideration of the questions posed by the family association theory relied on by the Colorado Supreme Court is not necessary to the decision in this case. Minnesota v. National Tea Co., 309 U.S. 551 (1940). Point I.

Respondents are plainly entitled to seek relief as representatives of decedent under 42 U.S.C. § 1983. In this capacity, they have alleged a deprivation of life without due process of law, a constitutional violation which Congress clearly intended to redress under § 1983. Point II.

Federal law is controlling in determining damages in § 1983 cases. There is no basis, consistent with the purposes of § 1983, for deviating from this rule in civil rights cases in which the constitutional deprivations caused death. In any event, as the Colorado Supreme Court indicated, the damages limitations specified in the state wrongful death and survivorship statutes conflict with the policies and purposes of § 1983 and are thus inapplicable. Point III.

I. THIS COURT NEED NOT AND SHOULD NOT DECIDE WHETHER EXCESSIVE USE OF FORCE RESULTING IN A PARENT'S DEATH WOULD VIOLATE THE RESPONDENT CHILDREN'S ASSERTED CONSTITUTIONAL RIGHT TO CONTINUED FAMILY ASSOCIATION IF THE RESPONDENTS MAY PROCEED IN A REPRESENTATIVE CAPACITY UNDER SETTLED § 1983 LAW

Because of certain peculiarities of Colorado decisional law, the issues as currently framed by the petitioners would have the Court decide a difficult constitutional issue in the absence of any factual record, and worse, decide it unnecessarily. On its facts and on the record below, however, the judgment remanding this case for trial can be affirmed on a far simpler ground by applying settled principles of § 1983 law. Respondents may proceed as representatives and heirs of the decedent, who was killed in the course of a deprivation of constitutional right. Accordingly, this Court should affirm the judgment below -- which simply remands this case for trial --

on this settled ground, without reaching the novel and difficult issues prematurely reached by the Colorado Supreme Court.

The relief petitioners seek here is reversal of the Colorado Supreme Court's decision remanding this case for trial. They have mistakenly assumed that if this Court rejects respondents' claims based on their own asserted right to family association, the judgment below will be reversed and the complaint dismissed. In fact, however, the complaint squarely presents the additional claim that plaintiffs may proceed under 42 U.S.C. § 1983 as representatives and heirs of the decedent, who was killed in the course of a deprivation of his constitutional rights.5/ If respondents

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5/ See generally supra at 4-6 and Petitioner's Brief (hereinafter "PB") at i (questions presented for review).

are entitled to a trial on that claim -- and as we show infra in Part II, they plainly are -- then this Court may affirm the judgment below on that ground alone, without reaching the complex questions posed by the family association theory relied on by the Colorado Supreme Court.

Under these circumstances, this Court should simply affirm the judgment below on that settled ground. There is no factual record concerning the actual relationship respondents had with the decedent, although a factual background would plainly be vital to analyze the parameters of respondents' asserted claim. The issues posed are complex and delicate. Moreover, they may never need to be reached. Respondents may not prevail on either ground; or, they may prevail in a representative capacity, but not on their family association claim. This Court would need to consider that theory only if respondents prevailed on and received separate recovery for that claim -- an eventuality which may well never occur. Even in that event, moreover, the Court would be aided by both a trial record and jury instructions. In situations such as this, the Court should follow its well-established policy of "not passing upon questions of a constitutional nature which are not clearly necessary to a decision of the case." *Minnesota v. National Tea Co.*, 309 U.S. 551, 555 (1940). *See generally* *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)(Brandeis, J. dissenting in part).

II. RESPONDENTS HERE ARE PLAINLY ENTITLED TO PROCEED IN A REPRESENTATIVE CAPACITY

Deprivation of life without due process is a constitutional violation which Congress clearly intended to redress under § 1983. Congress, in enacting 42 U.S.C. § 1983, afforded a federal remedy to parties "deprived of constitutional rights, privileges and immunities by an official's abuse of his position." Monroe v. Pape, 365 U.S. 167, 172 (1961). By providing federal relief for constitutional violations, Congress recognized the fundamental importance of the protection of individuals' constitutional rights in our legal system.

The legislative history of the statute clearly demonstrates Congress' view that "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." Monroe v. Pape, supra, at 196 (Harlan, J., concurring).

Consistent with this legislative purpose, § 1983 affords a federal remedy for "deprivations of rights, privileges and immunities secured by the Constitution or laws of the United States." Parratt v. Taylor, U.S. , 68 L.Ed. 2d 420 (1981). The existence of state law remedies does not alter the availability of federal relief. If a constitutional right has been violated, federal relief is available regardless of the existence of a state remedy for an overlapping common law right. See Monroe v. Pape, 365 U.S at 183; Carey v. Piphus, 435

U.S. 247, 258-59 (1978).

In this case, respondents clearly allege the deprivation of a constitutional right under color of law. See JA 3. The Fourteenth Amendment of the U.S. Constitution explicitly proscribes the deprivation of life without due process of law. Nowhere is such a due process violation clearer than where a state law enforcement officer uses excessive and unreasonable force in detaining a suspect and the victim is killed as a result of this lawless conduct. This Court has so held on numerous occasions. See Jones v. Hildebrant, 432 U.S. 183; Scheuer v. Rhodes, 416 U.S. 232 (1974); U.S. v. Price, 383 U.S. 787 (1966). As the Court has held, "it is plain that basic to the concept of due process of law in a criminal case is a trial -- a trial in a court of law, not a 'trial by ordeal'". Screws v. United States, 325 U.S.

106 (1945) quoting from Brown v. Mississippi, 297 U.S. 278 (1936).

The doctrinal rationale behind these cases is obvious. The symbolic power of constitutional proscription of lawless deprivation of life is necessary to deter this not uncommon abuse of official position with such profound and irrevocable consequences. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 411 (1971) (Harlan, J. concurring)(damage action for constitutional violation important to deter "flagrant and patently unjustifiable ... police conduct").[6]

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[6] Petitioners do not argue in this case that due process is satisfied by the availability of a post-deprivation remedy under state law for the injury to liberty or property interests. Compare Parratt v. Taylor U.S. , 68 L.Ed. 2d 240 (1981). Nor could they; the rationale of Parratt has no application to this case. Respondents do not seek constitutional redress for negligent deprivation of property. Nor are (footnote continued on following page)

Finally, it is clear that, under either federal or state law, decedent's cause of action for deprivation of his constitutional rights survives and may be maintained by respondents in their representative capacity. See, e.g., Robertson

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(footnote continued from preceding page) they seeking damages under § 1983 for "nothing more than an automobile accident with a state official." Id. at 434. Respondent Arthur Espinoza was deprived of his most basic interest -- his life -- and the complaint clearly alleges that the police officers who killed Espinoza did so intentionally and without justification. The subjection of decedent to trial by ordeal is in and of itself "antithetical to fundamental notions of due process". Parratt v. Taylor, supra at 435. (Blackmun, J. concurring); Screws v. U.S., 325 U.S. at 106.

Nor is Ingraham v. Wright, 430 U.S. 651 (1977) relevant to this case. This case does not involve conduct with a low incidence of abuse in an open setting where the risk of error is minimal. Instead, it involves police misconduct which the number of cases seeking relief for such illegal activity shows to be widespread. Moreover, the type of summary punishment by police alleged here takes place in situations where citizens are powerless to impose meaningful restraint on police abuse of power. See Bivens v. Six Unknown Federal Narcotics Agents, supra.

v. Wegmann, 436 U.S. 584 (1978). Indeed, the Colorado Supreme Court appears to have so held, and the petitioners do not disagree. Thus, this Court need not decide the issue left open in Robertson v. Wegmann, 436 U.S. at 592, 594, namely whether federal law would itself guarantee survival when the constitutional deprivation caused death and state law did not provide for survival.

III. BECAUSE FEDERAL LAW GOVERNS DAMAGES IN ALL § 1983 ACTIONS INVOLVING DEPRIVATIONS OF CONSTITUTIONAL RIGHTS, THE DAMAGE LIMITATIONS CONTAINED IN THE COLORADO WRONGFUL DEATH AND SURVIVORSHIP STATUTES ARE INAPPLICABLE. IN ANY EVENT, THOSE LIMITATIONS COULD NOT BE APPLIED BECAUSE THEY ARE INCONSISTENT WITH THE POLICIES OF § 1983.

Petitioners argue that the state wrongful death statute's limitations on damages are applicable in § 1983 actions involving constitutional deprivations resulting in death. That statute has been interpreted to allow recovery of only compensatory damages consisting of the "net pecuniary loss" of a decedent's services and support. Neither the state wrongful death statute[7/] nor the state survivorship statute[8/] allow the recovery of punitive damages. These limitations on damages have no bearing on the determinations

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[7/] § 13-21-202, C.R.S. 1973

[8/] § 13-20-101, C.R.S. 1973

of damages for deprivations of constitutional rights. In any event, they are inconsistent with federal law and thus may not be applied. This case should be remanded for trial under federal law.[9]

A. Federal Law Is Controlling In Determining Damages In Civil Rights Actions Involving Constitutional Deprivations Resulting In Death.

This Court has repeatedly held that the damages rule in § 1983 cases is "a federal rule responsive to the need whenever a federal right is impaired." Moor v. County of Alameda, 411 U.S. at 703, quoting Sullivan v. Little Hunting Park, 396 U.S. 229, 240 (1969). "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678 (1946).

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[9] Ths case can be disposed of on the issue addressed supra in Point I, without consideration of the appropriate damages rule to be applied if respondents prevail at trial. However, because of the significance of the damages issue and the possibility that this Court may wish to provide some guidance to the court below, amici will briefly address it.

This principle, that damages in civil rights cases are governed by federal law, is rooted in the basic purposes of § 1983 as reflected in the legislative history and subsequent decisions of this Court. As we demonstrated in Point II, *supra*, Congress has determined that a constitutional deprivation is "significantly different from and more serious than a violation of a state right." *Monroe v. Pape*, *supra* at 196 (Harlan, J. concurring). Section 1983 was not intended to serve as a general tort remedy for common law torts. *See* *Parratt v. Taylor*, 68 L.Ed. 2d at 434; *Paul v. Davis*, 424 U.S. 693, 701 (1976). Rather, Congress enacted § 1983 to provide a federal remedy "tailored to the interests protected by the particular [constitutional] right in question." Carey v. Piphus, supra at 259. Indeed, the purposes of the statute -- compensation for, deterrence of, and punishment for deprivations of constitutional rights under color of state law -- relate directly to the nature of the damages available in § 1983 actions. See City of Newport v. Fact Concerts, Inc., 69 L.Ed. 2d 616, 632 (1981); Carey v. Piphus, 435 U.S. at 257 n.11; cf. Bivens v. Six Unknown Federal Narcotics Agents; 403 U.S. 388, 409 (1971) (Harlan, J. concurring). The damage rules applicable in § 1983 cases must, then, address both the serious nature of a constitutional injury and the corresponding importance of preventing its recurrence.

This Court has adhered to these principles in formulating federal damages law under § 1983. In so doing, it has followed the clearly established principle that, in formulating appropriate federal rules of damages, "both federal and state rules of damages may be utilized, whichever best serves the policies expressed in the federal statutes." Sullivan v. Little Hunting Park, 396 U.S. at 240. In Carey v. Piphus, supra, the Court determined, by evaluating common law principles of damages in light of the purposes of § 1983, that mental and emotional distress caused by the denial of procedural due process is compensable if plaintiffs show actual injury. The Court also recognized the availability of punitive damages in appropriate § 1983 actions.[11] Similarly, in City of Newport v. Fact Concerts, Inc., supra, the Court fashioned a federal rule concerning punitive damages by considering common law immunity of municipalities from punitive damages in the context of the goals of § 1983.

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[11] 435 U.S. at 264. As Justice White noted in his dissent in Jones v. Hildebrant: "[t]he Courts of Appeals have taken a similar approach by allowing recovery of punitive damages in suits brought under § 1983 even if state law would not have permitted them." 432 U.S. at 191 (citing cases).

In this manner, the Court has developed federal damages law tailored to the purposes of § 1983.[12/] This law and approach, developed in § 1983 actions not involving death, are just as applicable in § 1983 actions involving constitutional deprivations which do result in the death of the victim. There is no basis, consistent with the purposes of § 1983, for altering the

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12/ As the Court noted in Carey v. Piphus, 435 U.S. at 258 n.13, a similar approach has been adopted for constructing immunities under § 1983. See, e.g., Imbler v. Pachtman, 424 U.S. 409, 417-419 (1976); Scheuer v. Rhodes, supra. In formulating federal rules for § 1983 immunities and damages, the Court has looked closely to Congress' purposes in enacting § 1983.

source of the damage rule based upon whether or not the victim was killed in the course of the deprivation.[13/] Just as the post-Civil War Congress adopted a federal measure of punishment for state officials who use their power to deprive an individual of constitutional rights resulting in death, *see* 18 U.S.C. § 242 and *Screws v. United States*, *supra*, so too Congress adopted a federal measure of damages in § 1983, the civil counterpart of 18 U.S.C. § 242.

B. The Damages Specified In The State Wrongful Death And Survivorship Statutes Conflict With The Policies And Purposes of § 1983

Although it is *amici*'s view that the damages limitations contained in Colorado wrongful death and survivorship statutes have no bearing on the appropriate measure of damages in this case, both the trial

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[13/] This is the very distinction that *Jones* and the decisions below would necessarily create.

court and the Colorado Supreme Court did consider the issue of whether those damage limitations are consistent with § 1983.[14/] If the Court reaches this issue, amici urge the Court to hold that the state wrongful death and survivorship statutes are inapplicable because they conflict with the policies and purposes of § 1983.

The state wrongful death statute is intended to provide compensation based on "the reasonable expectation of a benefit" which the heir "may have a right to indulge from a continuance of the life of the deceased." Denver & Rio Grande & Co. v. Frederic, 140 P. 463 (1914). This narrow

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14/ The decision of the Colorado Supreme Court in Jones v. Hildebrant, supra, upon which the lower court relied is, as the Colorado Supreme Court itself acknowledged, of dubious validity in light of recent development in § 1983 law. See Espinoza v. O'Dell, 633 F.2d at 461 n.8.

definition of compensation concerns only the heirs' property interests. The wrongful death remedy is not concerned with the nature of the act that caused the injury: rather, it focuses solely on pecuniary concerns. Fish v. Liley, 208 P.2d 930, 932 (1949). Accordingly, compensation for grief is not allowable. See DeCicco v. Trinidad Area Health Assoc., 573 P.2d 559 (Ct. App. 1977), cert denied (1978). Furthermore, exemplary or punitive damages may not be recovered under the wrongful death statute's limitation. Punitive damages are also unavailable under the terms of the survival statute. 13-20-101, C.R.S. (1973).

This restricted state measure of damages does not, nor is it intended to, take into account the fundamentally different nature of constitutional deprivations for which Congress intended to provide compensation in enacting § 1983. See Point II, supra. Indeed, in Carey v. Piphus, this Court acknowledged the special harm which may flow from deprivation of due process, and formulated a federal rule providing redress for this special constitutional injury. 435 U.S. at 262-64. See also Monroe v. Pape, 365 U.S. at 196 (Harlan, J. concurring); Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977)(damages awarded for deprivation of constitutional rights). By restricting recovery to purely pecuniary loss, the wrongful death statute fails to provide a remedy for interests which Congress principally intended to protect and redress through § 1983.

Moreover, by focusing solely on pecuniary loss to the representative of the decedent and precluding relief for the deprivation itself, these damages limitations foreclose the possibility of effectuating the deterrent purpose of § 1983. Deterrence of unlawful conduct is a basic goal of § 1983 which permeates the congressional history and § 1983 case law. See Robertson v. Wegmann, supra; Carey v. Piphus, supra. Federal law clearly promotes these purposes in both its definition of compensatory damages and in its allowance of punitive damages in appropriate cases. Indeed, this Court has recognized that, "after Carey punitive damages may be the only significant remedy available where constitutional rights are maliciously violated but the victim cannot prove compensable injury." Carlson v. Green, 446 U.S. 14, 22 n.9 (1980). Thus, application of the damages limitations contained in the state wrongful death and survivorship statutes in § 1983 cases in which the constitutional deprivation causes death would thwart the constitutional purposes of compensation and deterrence. Worse, it would do so in those cases where constitutional deprivations may be the most serious, and most in need of redress. As the Colorado Supreme Court recognized, this fundamental inconsistency of the state statutory damages limitations with federal law may not be tolerated under § 1988. Damages must be measured by a federal rule.

CONCLUSION

Respondents have a valid cause of action as representatives and heirs of the decedent. Because a new trial will therefore in any event be required, the judgment below should be affirmed on that ground, and the Court should avoid deciding other issues that, after trial, may well become moot.

Respectfully submitted,

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